Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 85-75)

Synopses of Drawback Decisions

The following are synopses of drawback rates issued August 27, 1984, to March 21, 1985, inclusive, pursuant to subparts A through C, inclusive, Part 191, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313 (a) and (b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded, and the date on which it was forwarded.

(DRA-1-09)

Dated: April 24, 1985.

File: 217895.

EDWARD B. GABLE, Jr.,
Director,
Carriers, Drawback and Bonds Division.

(A) Company: Ampex Corporation
Section 1313(a) articles: Electronic equipment including but not limited to television cameras and computer equipment
Section 1313(a) merchandise: Electronic assemblies and subassemblies, television camera lenses, camera pick-up tubes, core memories, electronic cables, harnesses and other electronic parts and devices identified by part numbers
Section 1313(b) articles: Magnetic tapes, various electronic equipment including television cameras, reproducing devices, etc.
Section 1313(b) merchandise: Audio base film, audio logging base film, electronic devices, assemblies, etc.
Factories: See contract
Statement signed: July 12, 1984
Basis of claim: Appearing in

Rate forwarded to Regional Commissioner of Customs: Los Angeles (San Francisco Liquidation), August 27, 1984
Revokes: T.D. 72-121-Q and unpublished approval of June 11, 1979, as amended by T.D. 81-180-C

(B) Company: Ciba-Geigy Corporation
Section 1313(a) articles: Same as 1313(b)
Section 1313(a) merchandise: Same as 1313(b)
Section 1313(b) articles: Specialty dyes
Section 1313(b) merchandise: Various chemicals, and intermediate dyes
Factory: Toms River, NJ
Statement signed: October 15, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioners of Customs: New York and Boston (Baltimore Liquidation), January 4, 1985

(C) Company: CPC International Inc.
Section 1313(a) articles: Peanut butter
Section 1313(a) merchandise: Peanuts
Section 1313(b) articles: Peanut butter
Section 1313(b) merchandise: Peanuts
Factories: Little Rock, AR; Portsmounth, VA; Santa Fe Springs, CA
Statement signed: May 29, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, August 29, 1984
Revokes: T.D. 83-58-F

(D) Company: G.D. Searle & Co., Searle Chemicals Division
Section 1313(a) articles: Same as 1313(b)
Section 1313(a) merchandise: Same as 1313(b)
Section 1313(b) articles: Enamine, ethisterone, ethisterone ketal, aldona crude, aldona enol ether, aldadiene and spironolactone
Section 1313(b) merchandise: Androstenedione
Factory: Augusta, GA
Statement signed: August 12, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Chicago, November 20, 1984

(E) Company: Glen Raven Mills, Inc.
Section 1313(a) articles: Textured stretch nylon yarn
Section 1313(a) merchandise: Nominal 96 denier continuous filament nylon yarn
Section 1313(b) articles: Textured stretch nylon yarn
Section 1313(b) merchandise: Nominal 95 or 96 denier continuous filament nylon yarn
Factories: Altamahaw and Norlina, NC

Statement signed: November 12, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Miami, March 21, 1985

(F) Company: Glen Raven Mills, Inc.
Section 1313(a) articles: Textured stretch nylon yarn
Section 1313(a) merchandise: Nominal 26 to 28 denier continuous filament nylon yarn, not textured; nominal 50 to 54 denier continuous filament nylon yarn, not textured
Section 1313(b) articles: Textured stretch nylon yarn
Section 1313(b) merchandise: Nominal 26 to 28 denier continuous filament nylon yarn, not textured; nominal 50 to 54 denier continuous filament nylon yarn, not textured
Factories: Norlina and Altamahaw, NC
Statement signed: September 20, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Miami, November 1, 1984
Revokes: T.D. 84-172-G

(G) Company: The Lubrizol Corporation
Section 1313(a) articles: Same as 1313(b)
Section 1313(a) merchandise: Polyalkylbenzene
Section 1313(b) articles: Sulfonic acid, basic calcium sulfonate and finished lubricant additives
Section 1313(b) merchandise: Polyalkylbenzene and basic calcium sulfonate
Factories: Painesville, OH; Deer Park and Pasadena, TX
Statement signed: September 25, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Chicago, October 26, 1984
Revokes: T.D. 81-45-P

(H) Company: Narmco Materials, Inc.
Section 1313(a) articles: Prepreg plastic composite products (unitape and woven fabric)
Section 1313(a) merchandise: Synthetic carbon yarn
Section 1313(b) articles: Prepreg plastic composite products (unitape and woven fabric)
Section 1313(b) merchandise: Synthetic carbon yarn made of polynitrile fibers
Factory: Anaheim, CA
Statement signed: May 16, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, January 7, 1985

(I) Company: Shieldalloy Corporation
Section 1313(a) articles: Ferro Vanadium
Section 1313(a) merchandise: Vanadium pentoxide
Section 1313(b) articles: Ferro Vanadium
Section 1313(b) merchandise: Vanadium pentoxide and vanadium trioxide (V203)
Factory: Newfield, NJ
Statement signed: November 7, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Boston (Baltimore Liquidation), February 14, 1985

(J) Company: Simplex Wire and Cable Company
Section 1313(a) articles: Same as 1313(b)
Section 1313(a) merchandise: Galvanized steel armoring wire; high tensile strength steel wire; uncoated mild plow steel king wire
Section 1313(b) articles: Coaxial and lightwave submarine communication cables
Section 1313(b) merchandise: Galvanized steel armoring wire; zinc coated steel armoring wires; uncoated mild plow steel king wire; high tensile strength steel wires
Factory: Newington, NH
Statement signed: November 16, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Boston, December 24, 1984
Revokes: T.D. 81-45-U

(T.D. 85-76)

Synopses of Drawback Decisions

The following are synopses of drawback rates issued January 24, 1985, to March 29, 1985, inclusive, pursuant to Subpart C, Part 191, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was forwarded or issued.

(DRA-1-09)

Dated: April 30, 1985.

File: 217907.

EDWARD B. GABLE, Jr.,
Director,
Carriers, Drawback and Bonds Division.

(A) Company: Alumax Aluminum Corporation
Articles: Aluminum and aluminum alloy semi-fabricated and fabricated products including, but not limited to, extrusions, sheet, plate and coil
Merchandise: Aluminum or aluminum alloy in the form of pig, sow, ingot, tee, slab or billet
Factories: Lancaster, Leola and Harrisburg, PA; Magnolia, AR; Bedford Park, IL; Tucker, Atlanta and Tifton, GA; Cerritos, CA; Hutchinson, KS; Elkhart, IN; Rockwall, Mesquite and Alvarado, TX; Grand Rapids and Fraser, MI; Sanford, NC
Statement signed: July 9, 1984
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, February 21, 1985
Revokes: T.D. 77-293-L, to cover name change from Howmet Aluminum Corp.

(B) Company: A.W. Chesterton Company
Articles: Braided packing, various styles and types
Merchandise: Jute; asbestos yarns; Lea flax roving; Ramie
Factories: Woburn and Groveland, MA
Statement signed: November 19, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Boston, March 29, 1985

(C) Company: BF Goodrich Company
Articles: Ethylene dichloride, vinyl chloride, PVC resins and compounds, polymer chemicals and elastomers
Merchandise: Ethylene
Factories: Various, as listed in statement
Statement signed: January 10, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Boston (Baltimore Liquidation), February 15, 1985

(D) Company: Boyle's Famous Corned Beef Company
Articles: Beef top rounds, cooked, including cooked rounds having artificial smoked flavor
Merchandise: Beef top rounds, uncooked
Factory: Kansas City, MO
Statement signed: October 22, 1984

Basis of claim: Used in, less valuable waste
Rate forwarded to Regional Commissioner of Customs: Chicago, February 7, 1985
Revokes: T.D. 84-154-B

(E) Company: Eastern Processors Incorporated
Articles: Flue-cured and Burley scrap (strip) tobaccos, flue-cured and burley tobacco stems, and blended strip tobaccos
Merchandise: Unstemmed flue-cured and burley leaf tobaccos, and flue-cured and burley strip tobaccos
Factory: Rocky Mount, NC
Statement signed: November 29, 1984
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to Regional Commissioner of Customs: Miami, February 8, 1985

(F) Company: Eli Lilly and Co.
Articles: Denzemizole (Isoxaben®)
Merchandise: 2-ethyl-2-methylbutyric acid; 2-ethyl-2-methylbutyric acid tech; 2,6-dimethoxybenzoic acid; dimethyl formamide; acetone; thionyl chloride; hexane; acetonitrile
Factory: Lafayette, IN
Statement signed: October 26, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Chicago, March 12, 1985

(G) Company: Elkem Metals Company
Articles: Electrolytic chrome and electrolytic chrome VG
Merchandise: High carbon ferrochrome
Factories: Marietta, OH; Niagara Falls, NY
Statement signed: November 14, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, February 28, 1985

(H) Company: Elkem Metals Company
Articles: Simplex low carbon ferrochrome
Merchandise: High carbon ferrochrome
Factories: Marietta, OH; Niagara Falls, NY
Statement signed: November 14, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, March 1, 1985

(I) Company: Elkem Metals Company
Articles: Chromium aluminum
Merchandise: High carbon ferrochrome; chromium oxide

Factories: Marietta, OH; Niagara Falls, NY
Statement signed: November 14, 1984
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, March 1, 1985

(J) Company: FMC Corporation
Articles: Kronitex; Durad; and Kronitex Tricresyl Phosphate Special (TCP Special)
Merchandise: Phenol-U.S.P.
Factories: South Charleston and Nitro, WV; Buffalo, NY; Livonia, MI; Pasadena, TX
Statement signed: March 4, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: New York, March 21, 1985

(K) Company: General Mills, Inc.
Articles: Fruit snacks including fruit roll-ups and fruit bars
Merchandise: Apricot puree; apple puree; pear puree
Factories: Chicago and West Chicago, IL; Buffalo, NY; Cedar Rapids, IA; Lodi, CA; Toledo, OH; Minneapolis, MN; Flemington, NJ
Statement signed: March 6, 1985
Basis of claim: Used in
Rate forwarded to Regional Commissioner of Customs: Chicago, March 26, 1985

(L) Company: General Tire, Inc.
Articles: Rubber tires
Merchandise: Steel tire cord
Factories: Barnesville, GA; Bryan, OH; Charlotte, NC; Mayfield, KY; Mount Vernon, IL; and Waco, TX
Statement signed: January 25, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Chicago, February 14, 1985
Revokes: T.D. 85-1-P

(M) Company: Guardsman Chemicals, Inc.
Articles: Lacquer and pigmented lacquer topcoat finishes; lacquer sealer coats
Merchandise: Nitrocellulose
Factories: South Gate, CA; Seattle, WA
Statement signed: December 4, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Los Angeles, February 20, 1985

(N) Company: Hail & Cotton, Inc.
Articles: Black fat tobacco and stripped tobacco
Merchandise: Flue-cured, fire-cured, burley, broad, and dark air-cured leaf tobaccos
Factories: Springfield, TN; Rocky Mount, NC
Statement signed: January 25, 1985
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to Regional Commissioner of Customs: Los Angeles (San Francisco Liquidation), March 1, 1985

(O) Company: Master Processing Corporation
Articles: Premixed synthetic rubber (master batch)
Merchandise: Polybutadiene synthetic rubber
Factory: Long Beach, CA
Statement signed: September 12, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, February 28, 1985

(P) Company: Phillips Paraxylene, Inc.
Articles: Paraxylene, toluene, fuel gas, paraffinic liquid (C-7 and lighter liquids), orthoxylene, mixed xylene and C-9 petrochemicals (heavy aromatics containing 9 or more atoms)
Merchandise: Mixed xylenes
Factory: Guayama, PR
Statement signed: December 20, 1983
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to Regional Commissioner of Customs: Miami, March 11, 1985

(Q) Company: Raytheon Company
Articles: Finished semiconductor devices
Merchandise: Semiconductors
Factory: Mountain View, CA
Statement signed: March 7, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Los Angeles (San Francisco Liquidation), March 21, 1985

(R) Company: Rohm and Haas Tennessee Incorporated
Articles: Mirrored acrylic plastic sheets
Merchandise: Clear acrylic plastic sheets
Factory: Knoxville, TN
Statement signed: January 25, 1985
Basis of claim: Appearing in

Rate forwarded to Regional Commissioner of Customs: Boston (Baltimore Liquidation), March 7, 1985
Revokes: T.D. 83-254-R

(S) Company: Stauffer Chemical Co.
Articles: Technical ordram; technical betasan; formulations of ordram and betasan
Merchandise: Benzene sulfonyl chloride (BSC); hexamethlenimine (HMI)
Factories: Bucks, AL; Dayton, NJ; Richmond, CA; North Little Rock, AR
Statement signed: December 19, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, March 21, 1985
Revokes: T.D. 70-189-N and T.D. 73-172-G

(T) Company: Syntex Puerto Rico, Inc.
Articles: Granulated, tabletted, and packaged tabletted Naproxen
Merchandise: Naproxen (d-2-(6'-Methoxy-2-naphthyl) propionic acid
Factory: Humacao, PR
Statement signed: February 19, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioners of Customs: Miami and Los Angeles, March 7, 1985
Revokes: T.D. 84-123-V

(U) Company: The Timberland Company
Articles: Boots and shoes
Merchandise: Bovine upper shoe leather, split, grained, and finished; brass hooks (fasteners)
Factories: Newmarket, NH; Isabela, PR
Statement signed: November 16, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: Boston, January 24, 1985

(V) Company: Titanium Metals Corporation of America, Timet Division
Articles: Titanium and titanium alloy ingots and mill products such as billets, bars and sheets
Merchandise: Titanium sponge and on a pound for pound basis of the titanium content in titanium scrap for designated titanium sponge
Factories: Toronto, OH; Henderson, NV
Statement signed: January 23, 1985
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, March 13, 1985

(W) Company: Umetco Minerals Corporation
Articles: Tungsten oxide (Blue Oxide)
Merchandise: Tungsten concentrates, calcium tungstate, tungsten scrap or ammonium paratungstate
Factories: Bishop, CA; Niagara Falls, NY
Statement signed: February 1, 1985
Basis of claim: Appearing in
Rate issued by Regional Commissioner of Customs in accordance with section 191.25(b)(2), Customs Regulations: New York, February 26, 1985
Revokes: T.D. 71-167-B, T.D. 73-9-B and T.D. 74-300-T, to cover successorship from Union Carbide Corporation

(X) Company: Union Carbide Caribe, Inc.
Articles: Phase I and Phase II and manufactured products, as listed in statement
Merchandise: Phase I petroleum derivatives (refinery gas (C1 to C5 range); naphtha class IV; gas oil class III, and raffinate); phase II petroleum derivatives (ethylene; propylene; acetylene; benzene, nitration grade, ethanol)
Factory: Ponce, PR
Statement signed: December 31, 1984
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to Regional Commissioner of Customs: New York, March 11, 1985

(Y) Company: Uniroyal, Inc., Uniroyal Chemical Division
Articles: Celogen OT
Merchandise: Diphenyl oxide
Factory: Geismar, LA
Statement signed: February 8, 1984
Basis of claim: Appearing in
Rate forwarded to Regional Commissioner of Customs: New York, March 21, 1985

(Z) Company: The Upjohn Company
Articles: Stigmasterol, sitosterol, and various pharmaceuticals
Merchandise: Soya sterols
Factory: Kalamazoo, MI
Statement signed: January 24, 1985
Basis of claim: For stigmasterol and sitosterol, used in, with distribution to the products obtained in accordance with their relative values at the time of separation; for other pharmaceuticals, used in
Rate forwarded to Regional Commissioner of Customs: Chicago, March 11, 1985
Revokes: T.D. 79-230-W

Allsun Products, Inc., operating under T.D. 78-397-A, has changed its name to Allsun Pure Juice Corporation.

(T.D. 85-77)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C.).

Greece drachma:	
April 1, 1985	$0.007463
April 2–3, 1985	.007353
April 4, 1985	.007313
April 5, 1985	.007353
Israel shekel:	
April 1–5, 1985	N/A
South Korea won:	
April 1, 1985	.001173
April 2, 1985	.001170
April 3–5, 1985	.001166
Taiwan N.T. dollar:	
April 1–2, 1985	.025259
April 3, 1985	.025240
April 4–5, 1985	N/A

(LIQ-03-01 S:COM CIE)

Dated: April 5, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 85-78)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c), has certified buying rates for the dates and foreign currencies shown below. The

rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C.).

Greece drachma:	
April 8, 1985	$0.007353
April 9, 1985	.007273
April 10, 1985	.007329
April 11, 1985	.007418
April 12, 1985	.007491
Israel shekel:	
April 8-12, 1985	N/A
South Korea won:	
April 8, 1985	.001163
April 9-10, 1985	.001160
April 11, 1985	.001161
April 12, 1985	.001162
Taiwan N.T. dollar:	
April 8-9, 1985	.025233
April 10, 1985	.025253
April 11, 1985	.025246
April 12, 1985	.025240

(LIQ-03-01 S:COM CIE)

Dated: April 12, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 85-79)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C.).

Greece drachma:	
April 15, 1985	$0.007519
April 16, 1985	.007587

April 17, 1985	.007536
April 18, 1985	.007576
April 19, 1985	.007605
Israel shekel:	
April 15–19, 1985	N/A
South Korea won:	
April 15, 1985	.001162
April 16, 1985	.001163
April 17, 1985	.001164
April 18–19, 1985	.001162
Taiwan N.T. dollar:	
April 15, 1985	.025233
April 16, 1985	.025221
April 17, 1985	.025208
April 18, 1985	.025183
April 19, 1985	.025151

(LIQ-03-01 S:COM CIE)

Dated: April 19, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 85-80)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C.).

Greece drachma:	
April 22, 1985	$0.007663
April 23, 1985	.007547
April 24, 1985	.007366
April 25, 1985	.007342
April 26, 1985	.007294
Israel shekel:	
April 22–26, 1985	N/A
South Korea won:	
April 22, 1985	.001163

April 23, 1985	.001160
April 24, 1985	.001155
April 25, 1985	.001154
April 26, 1985	.001153
Taiwan N.T. dollar:	
April 22, 1985	.025119
April 23, 1985	N/A
April 24, 1985	.025094
April 25, 1985	.025063
April 26, 1985	.025050

(LIQ-03-01 S:COM CIE)

Dated: April 26, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 85-81)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C.).

Greece drachma:	
April 29, 1985	$0.007321
April 30, 1985	.007273
Israel shekel:	
April 29, 1985	N/A
April 30, 1985	N/A
South Korea won:	
April 29, 1985	.001151
April 30, 1985	.001152
Taiwan N.T. dollar:	
April 29, 1985	.025025
April 30, 1985	.025019

(LIQ-03-01 S:COM CIE)

Dated: April 30, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 85-82)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85-55 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Sri Lanka rupee:	
April 4-5, 1985	N/A
Thailand baht:	
April 5, 1985	N/A

(LIQ-03-01 S:COM CIE)

Dated: April 5, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 85-83)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85-55 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

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Sri Lanka rupee:	
April 12, 1985	N/A

(LIQ-03-01 S:COM CIE)

Dated: April 12, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 85-84)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85-55 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
April 17, 1985	$0.64150
Canada dollar:	
April 19, 1985	.772798
Ireland pound:	
April 18, 1985	1.0505
April 19, 1985	1.0500
Switzerland franc:	
April 18, 1985	.403226
April 19, 1985	.403796
United Kingdom pound:	
April 18, 1985	1.2935
April 19, 1985	1.2930

(LIQ-03-01 S:COM CIE)

Dated: April 19, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 85-85)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85-55 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
April 22, 1985	$0.63350
April 23, 1985	.64200
Brazil cruzeiro:	
April 23-25, 1985	.000207
April 26, 1985	N/A
Switzerland franc:	
April 22, 1985	.399521

(LIQ-03-01 S:COM CIE)

Dated: April 26, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 85-86)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 85-55 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Brazil cruzeiro:	
April 29-30, 1985	N/A

(LIQ-03-01 S:COM CIE)

Dated: April 30, 1985.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

ERRATUM

In CUSTOMS BULLETIN, Voume 19, No. 17, dated April 24, 1985, on page 5: "Solicitation of comments; Receipt of domestic interested party petition concerning tariff classification of certain fuel grade ethanol;" the date of publication in the Federal Register was incorrectly stated as April 1, 1985, the correct date of publication in the Federal Register was April 11, 1985.

U.S. Court of Appeals for the Federal Circuit

Appeal No. 84-1638

VIVITAR CORP., APPELLANT *v.* THE UNITED STATES, ET AL., APPELLEES AND 47TH STREET PHOTO, INC., INTERVENOR

James M. Johnson, Wiley & Rein, of Washington, D.C., argued for appellant. With him on the brief were *Thomas W. Kirby, Steven P. Kersner* and *Donald S. Stein,* Brownstein, Zeidman and Schomer, of Washington, D.C., were on the brief for appellant.

R. Kenton Musgrave, General Counsel, Vivitar Corporation, of Santa Monica, California, of counsel.

Majorie M. Shostak and *James F. O'Hara,* Stein, Shostak, Shostak & O'Hara, of Washington, D.C., of counsel.

David M. Cohen, Director, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellee. With him on the brief were *Richard K. Willard,* Acting Assistant Attorney General and *Velta A. Melnbrencis.*

Nathan Lewin, Miller, Cassidy, Larroca & Lewin, of Washington, D.C., argued for intervenor, 47th Street Photo, Inc. With him on the brief was Jamie S. Gorelick. *Marvin H. Wolf,* Groman & Wolf, of Mineola, New York, was on the brief for intervenor.

Edward T. Borda, General Counsel, Association of General Merchandise Chains, Inc., of Washington, D.C., was on the brief for Amicus Curiae.

Robert Ullman, Jacob Laufer and *Steven R. Trost,* Bass & Ullman, of New York, New York, was on the brief for Amicus Curiae, American Free Trade Association.

John M. Hadlock, Max F. Schutzman and *Katherine L. Frank,* Whitman & Ransom, of New York, New York, was on the brief for Amicus Curiae, Olympus Corporation.

Robert W. Steele, P.C., and *Robert E. Hebda,* Steele, Simmons & Fornaciari, of Washington, D.C., was on the brief for Amicus Curiae, K Mart Corporation. *James C. Tuttle,* Antitrust & International Counsel, of Troy, Michigan, was on the brief for K Mart Corporation.

William H. Allen, Eugene A. Ludwig, Scott D. Gilbert and *Daniel A. Rowley,* Covington & Burling, of Washington, D.C., were on the brief for Amicus Curiae, Coalition to Preserve The Integrity of American Trademarks.

William F. Sondericker, Frank W. Gaines, Jr. and *Robert L. Hoegle,* Olwine, Connelly, Chase, O'Donnell & Weyher, of Washington, D.C., were on the brief for Amicus Curiae, Progress Trading Co., Inc.

Appealed from: U.S. Court of International Trade.

Judge Restani.

Appeal No. 84-1638

VIVITAR CORP. APPELLANT *v.* THE UNITED STATES, ET AL., APPELLEES AND 47TH STREET PHOTO, INC., INTERVENOR

(Decided May 6, 1985)

Before MARKEY, *Chief Judge,* RICH, DAVIS, NIES, and BISSELL, *Circuit Judges.*

NIES, *Circuit Judge.*

This appeal concerns the importation into the United States of what have come to be called "grey market" goods. Goods are produced and legitimately sold abroad under a particular trademark and are imported into the United States and sold in competition with goods of the owner of U.S. trademark rights in the identical mark. But for international boundaries and the territoriality of trademark rights, the use of the trademark in competition with the U.S. owner would not constitute infringement because of the relationship between the foreign entity from whom the goods were directly or indirectly obtained and the owner of U.S. rights in the mark. In this sense, grey market goods are "genuine" and bear a "genuine" trademark. In some instances, the U.S. trademark owner is an importer of the goods as well, in which case the grey market goods are known as "parallel importations."

Vivitar Corporation, a California corporation, brought suit in the U.S. Court of International Trade against the United States for a declaratory judgment to invalidate regulations of the Department of Treasury Customs Service which, in Vivitar's view, improperly allow importation of grey market goods contrary to the express provisions of 19 U.S.C. § 1526 (Section 526, Tariff Act of 1930, hereinafter § 1526). Specifically, Vivitar seeks to force the Customs Service to refuse importation of any foreign manufactured photographic equipment bearing its U.S. registered trademark VIVITAR unless Vivitar gives specific consent to such importation. Vivitar's position is that § 1526(a) gives it an absolute right, as a U.S. company owning a U.S. trademark registration, to require Customs to prevent importation of foreign manufactured goods bearing the trademark VIVITAR, and that the regulations of the Customs Service which recognize some exceptions to the bar against importation without the consent of the U.S. trademark owner are invalid. The Court of International Trade upheld the regulations as the correct interpretation of the statute.

In this appeal, Vivitar urges reversal of the judgment of the Court of International Trade as a matter of law. The United States endorses the decision of the court on the merits, but challenges that court's holding that it had jurisdiction over the subject

matter.[1] Intervenor, 47th Street Photo, Inc., urges affirmance of the appealed judgment in its entirety.[2]

We conclude that the Court of International Trade correctly held that it has jurisdiction over the subject matter of this action under 28 U.S.C. § 1581(a), (i)(3), and/or (i)(4). With respect to the merits, we conclude that Customs' regulations do not define the limits of protection afforded a U.S. trademark owner under § 1526. We, nevertheless, conclude that the regulations are a reasonable exercise of Customs' power to exclude under the statute as a matter of agency initiated enforcement. Since the factual situations involving grey market importations vary widely and not all may be in violation of § 1526(a), we hold that Customs is not required to provide for automatic exclusion beyond that set forth in its current regulations. Exclusion of goods in situations involving common ownership and/or control of U.S. *and* foreign trademark rights may be left by Customs for determination in the first instance by the courts. When a U.S. trademark owner has successfully pursued a claim against a private party, Customs must, of course, give effect to any judicial determination that the owner has a right to bar importation of goods bearing its mark, even though the goods were obtained from or through a foreign related company.

Accordingly, we affirm the judgment of the Court of International Trade, but on narrower grounds.

I

This appeal is from the grant of summary judgment in favor of the government and the denial of summary judgment in favor of Vivitar. Since no trial was conducted, there is little in the record with respect to the exact nature of Vivitar's activities in the United States and abroad. Nor do we have a specific import transaction before us which is challenged. The challenge by Vivitar is against the regulations *per se.* The material facts on which the parties rely are few and not in dispute. Essentially the facts establish Vivitar's standing to challenge the regulations.

Vivitar Corporation, a domestic corporation organized under the laws of the state of California, is the owner of U.S. Trademark Reg. No. 808,478, issued May 17, 1966, covering the trademark VIVITAR for some kinds of photographic equipment.[3] The registration has been recorded since 1969 with the U.S. Customs Service pursuant to regulations implementing exclusion provisions in the customs statute (§ 1526), as well as other exclusion provisions found in the trademark statute, 15 U.S.C. § 1124.

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[1] The decisions of the Court of International Trade on jurisdiction and the merits are reported at 585 F. Supp. 1419 (1984) and 593 F. Supp. 420 (1984), respectively.

[2] Amicus briefs have been accepted from Olympus Corporation, Coalition to Preserve the Integrity of American Trademarks, American Free Trade Association, The National Association of Catalog Showroom Merchandisers, Progress Trading Company, Inc., K-Mart Corporation and the Association of General Merchandise Chains, Inc.

[3] No copy of the certificate appears in the record so that we do not know precisely what goods are described in the registration.

Vivitar is engaged in the sale of photographic equipment in the United States and abroad. Apparently, Vivitar has little or no manufacturing facilities of its own, but rather has its products manufactured to specification by various foreign manufacturers, principally in Japan.[4] The trademark VIVITAR is affixed or displayed on this equipment at Vivitar's direction. Vivitar has set up a worldwide marketing arrangement so that the parent, appellant here, retains the U.S. market, and various foreign subsidary corporations sell abroad. We will assume that Vivitar and its subsidiaries are selling the same products. No information is of record with respect to technical ownership of foreign trademark rights in the VIVITAR trademark.

In the United States, Vivitar has set up a network of independent authorized dealerships to whom it sells for resale to the public. VIVITAR products are, however, also reaching the U.S. market via independent importers who purchase VIVITAR products abroad (we do not know whether directly from Vivitar's subsidiaries or not), import them into the United States, and sell them through discount outlets, such as intervenor, 47th Street Photo. The price differential between U.S. and foreign markets on VIVITAR equipment makes the discount operations profitable. Vivitar seeks to justify its authorized dealers' higher prices as compared to those of discount houses by its extensive advertising costs, warranty costs, and other legitimate business expenses necessary to promote its VIVITAR products in the U.S. and maintain its goodwill in the mark. Vivitar accuses the discount houses of obtaining a free ride which will eventually destroy the reputation and sales value of its VIVITAR trademark. These matters were not, of course, litigated or resolved by the CIT in ruling on the motions for summary judgment. The sole question was whether Vivitar has a statutory right to have the Customs Service exclude imports of VIVITAR products except those consigned to Vivitar. This issue was not framed in terms of the particular facts of Vivitar's distribution system in the U.S. and abroad, but as a general proposition with respect to the rights available under § 1526 to every domestic owner of a registered U.S. trademark.

The statutory provision in dispute, 19 U.S.C. § 1526(a), reads as follows:

> Except as provided in subsection (d) of this section, it shall be *unlawful to import* into the United States *any merchandise of foreign manufacture* if such merchandise, or the label, sign, print, package, wrapper, or receptacle, *bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the*

[4] The foreign manufacturer is referred to as "a licensee" of Vivitar in the CIT opinion. No license is required in such situations since the manufacturer is not "using" the mark. A supply contract is normally all that is necessary to secure private brand merchandise. *See* 1 H. Nims, *Unfair Competition and Trade-Marks* § 212, at 613–14 (4th ed. 1947).

> *Patent and Trademark Office by a person domiciled in the United States,* under the provisions of sections 81 to 109 of title 15, and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury, in the manner provided in section 106 of said title 15, *unless written consent of the owner of such trademark is produced at the time of making entry.* [Emphasis added.]

The complete current text of 19 U.S.C. § 1526 appears in the appendix. The remaining sections deal with (b) seizure and forfeiture; (c) private remedies by trademark owners against persons dealing in wrongfully imported goods; (d) exemptions for personal use; and (e) special provisions for goods bearing counterfeit marks. The statute, thus, explicitly provides for a private remedy for violation of (a) in (c) and at least suggests by (a), (b) and (d) that Customs assume an active role *sua sponte* in enforcement.

The current customs regulations, 19 C.F.R. § 133.21, read in pertinent part:

> (a) *Copying or simulating marks or names.* Articles of foreign or domestic manufacture bearing a mark or name copying or simulating a recorded trademark or trade name shall be denied entry and are subject to forfeiture as prohibited importations. A "copying or simulating" mark or name is an actual counterfeit of the recorded mark or name or is one which so resembles it as to be likely to cause the public to associate the copying or simulating mark with the recorded mark or name.
>
> (b) *Identical trademark.* Foreign-made articles bearing a trademark identical with one owned and recorded by a citizen of the United States or a corporation or association created or organized within the United States are subject to seizure and forfeiture as prohibited importations.
>
> (c) *Restrictions not applicable.* The restrictions set forth in paragraphs (a) and (b) of this section do not apply to imported articles when:
>
> > (1) Both the foreign and the U.S. trademark * * * are owned by the same person or business entity;
> >
> > (2) The foreign and domestic trademark * * * owners are parent and subsidiary companies or are otherwise subject to common ownership or control (see §§ 133.2(d) and 133.12(d));
> >
> > (3) The articles of foreign manufacture bear a recorded trademark * * * applied under authorization of the U.S. owner.

That the regulations are patently less protective of the interests of a U.S. trademark owner than the literal language of the statute is the essence of Vivitar's case.

II

Jurisdiction

A

The government's initial response to Vivitar's complaint was to file a motion to dismiss for lack of jurisdication in the Court of International Trade (CIT).

The government's position is that the statute which Vivitar asserts has been violated, 19 U.S.C. § 1526(a), is one which relates to trademarks. Thus, in the government's view, 28 U.S.C. § 1338(a), which grants jurisdiction to the U.S. district courts over "any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and *trade-marks*" (emphasis added) is controlling on the jurisdictional question. The government concludes that since the CIT possesses *exclusive* jurisdiction only, not concurrent jurisdiction with the federal district courts, the CIT cannot posses jurisdiction over the present action.

Vivitar argues that its complaint can rest on several bases under 28 U.S.C. § 1581(i).[5] Specifically, Vivitar relies on the CIT's jurisdiction under 28 U.S.C. § 1581(i)(3) over a civil action against the United States arising out of a law providing for an "embargo" or "quantitative restriction," and on the court's administration and enforcement powers under 28 U.S.C. § 1581(i)(4) over protests (28 U.S.C. § 1581(a)).[6] Under either of these theories, the claim falls within the *exclusive* jurisdiction of the CIT, and there is then no jurisdiction in the federal district courts.

In an opinion dated April 4, 1984, Judge Restani denied the government's motion to dismiss for lack of jurisdiction. The court began its analysis by rejecting Customs' argument that the case belonged in federal district court as one arising under the trademark laws within the meaning of 28 U.S.C. § 1338(a). The flaw in the argument, according to the court, was that, while district courts generally have jurisdiction over trademark cases under 28 U.S.C. § 1338, not all cases involving trademarks must be heard in the district courts.[7]

[5] 28 U.S.C. § 1581(i) reads as follows:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

[6] Judge Restani rejected a third argument based on 28 U.S.C. § 1581(i)(1), and this basis is not reasserted on appeal.

[7] The court cited a string of cases in support of this, in particular, *Manufacture De Machines Du Haut-Rhin* v. *Von Raab*, 6 CIT— 569 F. Supp. 877 (1983); *Manufacture De Machines du Haut-Rhin* v. *International Armament Corp.*, No. 82-1114-A (E.D.V.I. 1983); *Lois Jeans & Jackets, U.S.A., Inc.* v. *United States*, 5 CIT 238, 566 F. Supp. 1523 (1983); *cf. Schaper Mfg. Co.* v. *Regan*, 5 CIT 266, 566 F. Supp. 894 (1983) (case involving copyright issues).

Continued

This case, although arising out of a dispute involving a trademark was, nevertheless, considered by the CIT to be within its jurisdiction because "the thrust of plaintiff's grievance is that Customs Service's administration and enforcement of § 1526 (a) and (b) is improper." In arriving at this conclusion, the court relied on Vivitar's abandonment of all claims which would require a determination that a third party infringed Vivitar's trademark, and on Vivitar's concession that the goods at issue were properly affixed with the VIVITAR trademark abroad. The court further opined that the validity of Customs Service regulations was a matter particularly within the court's expertise. Moreover, per the court, the regulations were in need of a national, uniform interpretation to avoid confusion and uncertainty.

The court then turned to the jurisdictional statute, 28 U.S.C. § 1581, in particular § 1581(i) quoted in note 5, *supra*, for a specific grant of authority over the case. Referring first to § 1581(i)(4), the court noted its jurisdiction over claims arising out of the administration and enforcement of the matters referred to in § 1581(a)–(h). Under § 1581(a), the court continued, it has jurisdiction "of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 [19 U.S.C. §§ 1514–15] of the Tariff Act of 1930." [8] In this case there had been no protestable *exclusion* of the goods in issue since the disputed regulations permit importation. The court, however, read § 1581(i)(4) broadly as "a residual independent jurisdictional basis for litigating Customs Service administration and enforcement of the substantive matter that may be the subject of a protest, but where the protest remedy is inappropriate or unavailable."

The court reasoned that reading § 1581(i)(4), when applied to § 1581(a), as limited only to cases arising from the administration and enforcement of protests, would render it duplicative to § 1581(a). Rather, citing *United States* v. *Uniroyal, Inc.*, 687 F.2d 467, 475 (CCPA 1982) (Nies, J., concurring), the court held that its jurisdiction under § 1581(i) was properly invoked, since there was no protestable exclusion and, thus, "the other provisions of 28 U.S.C. § 1581 are manifestly inadequate."

Alternatively, the court ruled that, since § 1526 provides for the exclusion of certain goods, jurisdiction over this case could be found in § 1581(i)(3), as an "embargo" or "quantitative restriction on the importation of merchandise." The court interpreted § 1581(i)(3) as granting the court jurisdiction over cases where the importation of goods is limited to a specific quantity; the statutory exclusion of

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The court declined to follow *Parfum Sterns, Inc.* v. *United States Customs Service*, 575 F. Supp. 416 (S.D. Fla. 1983), where the district court held that it had jurisdiction of an action similar to the instant case, but did not discuss the CIT's jurisdiction.

[8] 28 U.S.C. § 1581(a) reads:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

certain goods under § 1526, in the court's view, constituted a quantitative limit of zero.

B

The jurisdiction of the CIT with respect to a suit of this nature has not been uniformly recognized. Several federal district courts have also taken jurisdiction over civil actions against the government involving the importation of grey market goods. *See, e.g., Coalition to Preserve the Integrity of American Trademarks (CPIAT)* v. *United States,* 598 F. Supp. 844, 224 USPQ 701 (D.D.C. 1984) and *Olympus Corporation* v. *United States,* No. 84-0920 (E.D.N.Y. Nov. 15, 1984).

In both *Olympus* and *CPIAT,* the thrust of each complaint was that the Customs regulations were inconsistent with § 1526. In each case an injunction was sought against the government for failure to exclude grey market goods.

In both suits jurisdiction was challenged on the basis that the Court of International Trade had exclusive jurisdiction over a civil action against the government concerning the validity of regulations implementing § 1526. Both district courts were aware of, but expressly rejected, Judge Restani's ruling on jurisdiction, holding instead that because the district courts had jurisdiction under 28 U.S.C. § 1331 over federal questions and under § 1338(a) over claims based on a federal statute relating to trademarks, the CIT could not have jurisdiction.

C

We are faced then with irreconcilable decisions from two district courts and the CIT, each asserting that the other lacks jurisdiction. However, we do not see that the jurisdictional statutes themselves are irreconcilable.

The jurisdiction granted to the U.S. Customs Court, predecessor to the Court of International Trade, has long been recognized as an exception to the jurisdiction of the district courts under 28 U.S.C. § 1331, i.e., federal question jurisdiction. *See, e.g., Sneaker Circus, Inc.* v. *Carter,* 566 F.2d 396, 398–99 (2d Cir. 1977), and cases cited therein. Thus, it is faulty analysis to look first to the jurisdiction of the district courts to determine whether the CIT has jurisdiction. Given the broad jurisdictional grant to district courts, a district court would always have jurisdiction, rather than the CIT, using this approach. The result would negate the intent of Congress in granting *exclusive* jurisdiction over certain matters to the CIT. The focus must be solely on whether the claim falls within the language and intent of the jurisdictional grant *to* the CIT. Since no new claims were created by the Customs Courts Act of 1980 (the 1980 Act), Pub. Law No. 96–417, 94 Stat. 1927 (1980), which created the CIT, the expanded jurisdiction given to that court, *a fortiori,*

means that additional exceptions to the jurisdiction of district courts must result.

With respect to litigation under § 1526 prior to enactment of the 1980 Act, there is no question that a federal district court was the forum for a trademark owner to pursue any claim for exclusion, whether against the government or a private party. However, one purpose of the 1980 Act was to consolidate jurisdiction over suits against the government in international trade matters, placing such matters in the province of the new court. H.R. Rep. No. 96-1235, 96th Cong., 2d Sess. 33, *reprinted in* 1978 U.S. Code Cong. & Ad. News 3729, 3745.

In this case, Vivitar raises no question of substantive trademark or unfair competition law with respect to activities of a particular private party. If Vivitar were asking the CIT to determine, for example, that certain goods imported by others and sold in this country under its mark constituted infringement of Vivitar's trademark rights or another form of unfair competition, such subject matter would be beyond the jurisdiction of the CIT. The determinations of the respective rights between private parties under 19 U.S.C. § 1526(c) was not changed by the 1980 Act and, therefore, continues to fall within the jurisdiction of the federal district courts. In contrast, the validity of the regulations governing exclusions of goods by Customs in general is the type of question to which the CIT can bring expertise.

Judge Restani held, and we agree, that Vivitar's action against the government for a determination that the Customs regulations are invalid falls within the exclusive jurisdiction of the CIT as a corollary to protest jurisdiction under 28 U.S.C. § 1581(a). The government attempts to undercut the basis for her analysis by arguing that the exclusion of goods by reason of the trademark thereon is not a matter which an importer may protest. We would agree if the importer were to seek a determination of rights vis-a-vis the trademark owner, a matter to be determined in district court. On the other hand, where the subject matter is the validity of regulations or of procedures thereunder, a protest is appropriate and, therefore, the denial thereof falls within the jurisdictional grant of 28 U.S.C. § 1581(a). *Accord, Lois Jeans & Jackets, U.S.A., Inc.,* v. *United States,* 5 CIT 238, 566 F. Supp. 1523 (1983) (importer brought a declaratory judgment action to determine rights against the trademark owner, while concurrently pursuing a protest to attack the government's failure to comply with regulations). Thus, the basis for Judge Restani's analysis is correct.

We hold alternatively that jurisdiction may rest on 28 U.S.C. § 1581(i)(3) and/or (4), as a civil action against the United States which arises out of an embargo [9] or quantitative restriction on certain goods, and the administration and enforcement thereof.

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[9] We note the use of the term "embargo" in the legislative history of § 1526. 62 Cong. Rec. 11,603 (1922).

Accordingly, we affirm the decision of Judge Restani that the CIT has jurisdiction over Vivitar's claim.[10]

III

Statutory Interpretation

The issue, as framed by the parties, is whether the regulations of the Customs Service correctly interpret the extent of protection afforded by the statute, 19 U.S.C. § 1526. The provisions of § 1526(a) appear to create a sweeping bar to importation of any goods bearing the same trademark as that owned by a U.S. company without the latter's consent. In contrast, Customs' regulations provide for a more limited prohibition. Under current regulations, a U.S. company must disclose foreign affiliated companies as part of the information required upon recordation of its mark.[11] With respect to goods of these affiliated companies, Customs does not require consent to importation and will not bar importation of goods from these sources bearing the recorded trademark, even if the U.S. trademark owner demands—as Vivitar has done—that the goods be excluded.[12]

The government makes two arguments in support of a narrow reading of the statute which would limit § 1526(a) protection to that provided by the regulations: (1) Congressional intent expressed at enactment and subsequently, and (2) long standing administrative interpretation and practice. Vivitar, on the other hand, argues that the regulations *violate* the statute. Neither party's position is persuasive for reasons discussed below.

A

Congressional Intent at Time of Enactment

The Court of International Trade concluded from a review of the legislative history that the sole purpose and effect of §1526 was to nullify the result of the decision of the Second Circuit in *A. Bourjois* v. *Katzel*, 275 F. 539 (2d Cir. 1921). The government urges that we adopt the lower court's analysis. Our review of legislative history, however, indicates that, while reversal of the *Katzel* decision was one purpose of § 1526, it was clearly, and we use that word advisedly, not the *sole* purpose. Review of events leading to passage of § 1526 must begin somewhat earlier than that case.

The Trademark Act of 1905, contained, *inter alia*, the following provisions:[13]

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[10] Because the CIT has jurisdiction, we have jurisdiction to review the merits of its decision under 28 U.S.C. § 1295(a)(5).

[11] 19 C.F.R. §§ 133.2(d) and 133.12(d).

[12] 19 C.F.R. § 133.21(c)(1), quoted *supra*. In 1982, Vivitar submitted a formal request for a letter ruling of its entitlement to exclude all goods bearing the VIVITAR mark unless it consented to importation. After 18 months without reply, Vivitar commenced this action.

[13] A comparable provision had appeared in statutes prior to the Act of 1905. *See, e.g.*, 16 Stat. 580 (1871), apparently the first of such provisions.

> § 27: That no article of imported merchandise * * * which shall copy or simulate a trademark registered in accordance with the provisions of this act * * * shall be admitted to entry at any custom house of the United States.

The statute also specified that, "to aid" in enforcing the prohibition, the registrant was to record his certificate of registration with the Department of Treasury.

In 1916, the Second Circuit had before it an appeal from an order granting an injunction which prohibited Customs from detaining merchandise which plaintiff Gretsch sought to import. *Fred Gretsch Mfg. Co.* v. *Schoening,* 238 F. 780 (2d Cir. 1916). Gretsch bought violin strings in Germany which were manufactured by a German company Mueller and sold there under Mueller's trademark ETERNELLE. Schoening was the exclusive sales agent for Mueller in the United States. Schoening obtained a U.S. trademark registration for ETERNELLE for violin strings and recorded that registration with Customs.[14] When Gretsch attempted to bring in "genuine" ETERNELLE violin strings from Germany, Customs, acting under § 27, barred their importation. Gretsch sued both Schoening and the Collector of Customs in New York in district court and obtained an injunction against the action taken by Customs.

In affirming the injunction, the Second Circuit held that under the law of the Second Circuit, Gretsch's sale of "genuine" Mueller strings under the ETERNELLE mark would not be an infrigement. The court then addressed whether Congress, nevertheless, intended § 27 to bar importation of "genuine" goods. The court concluded that there was no Congressional intent to bar non-infringing goods—that the words "copy or simulate" in § 27 embraced only infringements.

A few years later, the *Katzel* case, which has some similarities to the *Gretsch* case, was also decided by the Second Circuit. A French company, E. Wertheimer & Cie. (formerly A. Bourjois & Cie.), had established a business in the United States for its products, one of which was face powder sold under the trademark JAVA in a particular style of packaging. In 1913, Wertheimer sold its U.S. business, including all of its rights in the U.S. to its trademarks, trade dress, and trade names (including "A. Bourjois & Cie.") to A. Bourjois & Co., a New York corporation. Bourjois (NY) was not obligated to purchase any products from Wertheimer. However, Bourjois (NY) did, in fact, buy face powder in bulk from Wertheimer, which it then packaged for retail sale in the same style of box which Wertheimer had used in the U.S. and was continuing to use in France.[15]

[14] Whether Mueller agreed that Schoening was the U.S. owner and was entitled to register the mark was not determined in the suit.

[15] The principal difference was in the labeling of the respective company names. The Bourjois (NY) product bore the following legend:

Continued

The defendant Katzel operated a retail pharmacy in New York City. Sometime prior to 1921, Katzel bought a quantity of Wertheimer's retail packaged JAVA face powder in France and began selling the product in her New York store and to other retailers. The packaging for the Wertheimer goods sold by Katzel was almost identical to that of Bourjois (NY), and the products were, in fact, the same. The district court enjoined Katzel's sales as infringements. The Second Circuit, relying on the infringement part of the decision in the *Gretsch* case, reversed on the theory that no infringement occurred since the JAVA face powder Katzel was selling was "genuine." The *Katzel* court did not have before it any issue of blocking importation or the meaning of § 27. The court was simply making a decision on trademark infringement, presumably under the common law of New York.

The Second Circuit decision in *Katzel* had greater significance at the time than may be readily apparent. During World War I, the Alien Property Custodian (an arm of the federal government) had seized assets in this country owned by foreign nationals of enemy countries and had sold them to U.S. interests. Thus, a number of substantial U.S. businesses had been created, e.g., the U.S. maker of BAYER aspirin, which was entirely independent of its German counterpart and which would have been adversely affected by importation of "genuine" goods from abroad with the normalization of international relations. Thus, the *Katzel* litigation was pursued to the U.S. Supreme Court, which accepted the case, and efforts were also directed to Congress to provide relief from the Second Circuit's decision.

Several committees of Congress took up the matter. Fortuitously for proponents of restrictive importation, Congress had before it what became the Tariff Act of 1922, Pub. L. No. 67-318, 42 Stat. 975 (1922), and they were able to add § 1526 as an amendment to that bill. The legislative history of the section is very limited, consisting of a short floor debate in the Senate and a brief paragraph in the Conference Report, which reads in its entirety as follows:

> A recent decision of the circuit court of appeals holds that existing law does not prevent the importation of merchandise bearing the same trade-mark as merchandise of the United States, if the imported merchandise is genuine and if there is no fraud on the public. The Senate amendment makes such importation unlawful without the consent of the owner of the American trade-mark.

H.R. Rep. No. 1223, 67th Cong., 2d Sess. 158 (1922). The "recent decision" was *Katzel*, despite the mischaracterization of what the case had actually held.

Made in France—Packed in the U.S.A. by A. Bourjois & Co., Inc., of New York, Succ'rs. in the U.S. to A. Bourjois & Cie., and E. Wertheimer & Cie.
The Wertheimer boxes were labelled "A. Bourjois & Cie., E. Wertheimer & Cie., Successeurs."

The government argues that § 1526 was intended to do no more than "protect the property rights of Americans against fraud in the situation in which they had purchased trademark rights from foreign owners yet were unable to obtain relief when goods bearing the genuine trademark continued to be sold and imported." One sponsor did attempt to convince Senators who questioned the sweep of the proposed language that it would have no greater effect than to protect a U.S. purchaser of trademark rights in the U.S. against fraudulent conduct by the foreign seller of those rights.[16] However, opponents were unconvinced. The question was raised as to whether U.S.-made WONDER flour purchased in Canada would be excluded by the provision. The proposed legislation was hastily amended to add the limitation that only foreign manufactured goods were excludable, which took care of at least that objection.

Another supporter indicated he favored the legislation because of the transfer to certain U.S. interests of the BAYER trademark by the Alien Property Custodian. Another agreed that he also understood the purpose of the legislation was to protect such interests. Advocates, thus, were clearly not limiting themselves to the *Katzel* situation.

Our review of the comments in the floor debate leads us to the conclusion that the debate is too unfocused and misinformed to serve as a definitive basis for interpretation of § 1526. The floor debate, like the above committee report, indicates an erroneous understanding of the facts of the *Katzel* case, namely, that the French seller of the JAVA trademark was violating its contract and that the Second Circuit dealt with § 27 of the Trademark Act of 1905 in *Katzel*. The legislation was disparaged during the debate as a "midnight" amendment, the impact of which was not clear.

Under these circumstances, the remarks of one or more Senators are an unreliable indication of the sense of the chamber as a whole or of Congress. The only clear indication from the debate is that Congress realized it was providing a bar to importation even though at least one circuit (the *Katzel* court) would hold that the concurrent use of the mark on the parallel import would not be an infringement. With respect to infringing uses of trademarks on imports, such goods were already excluded, or at least excludable, by § 27 of the trademark statute. Congress did not debate or intend to change trademark law to make uniform what the various courts might hold to be infringements. Rather, it ignored trademark law and, by amendment to customs law, gave a U.S. owner of a trademark a right to exclude foreign goods bearing the same trademark as the U.S. company had registered in the U.S. and recorded with Customs. Ownership of a U.S. trademark registration was condition to an exercise of that right, but trademark infringement by the importer was not.

[16] The floor debate is reported at 62 Cong. Rec. 11,602–05 (1922).

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At the time of enactment, it cannot be disputed that Congress intended § 1526(a) to provide an exclusion remedy broader than that in § 27 of the trademark statute which, as held in *Gretsch,* was limited by the words "copy of simulate" to the barring of infringements. Additional support for the conclusion that § 1526 is not limited to infringements is found in the language of another paragraph of § 1526 enacted at the same time. That additional provision, 19 U.S.C. § 1526(c), reads:

> (c) Any person dealing in any such merchandise [excluded under (a)] may be enjoined from dealing therein within the United States or may be required to export or destroy such merchandise or to remove or obliterate such trade-mark and shall be liable *for the same damages and profits provided for wrongful use of a trade-mark,* under the provisions of such Act of February 20, 1905, as amended. [Emphasis added.]

Thus, a private remedy was created against persons dealing in merchandise prohibited under § 1526(a), who were made liable *for the same damages as provided for trademark infringement.* The damage remedy would have been wholly unnecessary if the statute had been intended to reach infringements only, since that remedy was already available in the Act of 1905.

A few months after the enactment of § 1526, the Supreme Court handed down its decision in *A. Bourjois* v. *Katzel* 260 U.S. 689 (1923). Emphasizing the territoriality of trademark rights, the Court reversed the Second Circuit's holding of non-infringement. Regardless of the genuineness of the face powder sold under the JAVA trademark in France, and its identity in composition to that sold by the U.S. trademark owner, sales by Katzel of the "genuine" article under the JAVA trademark could be enjoined in the United States because, as stated in the Court's opinion, the trademark JAVA "indicates in law, and, it is found, by public understanding, that the goods come from the plaintiff." 260 U.S. at 692. Since the goods which defendant was selling did not "come from" the plaintiff Bourjois in the sense of sponsorship, while the public would attribute such goods to the plaintiff, defendant's sales of face powder under the JAVA mark infringed plaintiff's rights. Thus, the Court repudiated several defenses asserted to trademark infringement: (1) That the use of the trademark of Bourjois without its consent was justified because the goods sold under the mark were identical to those of the trademark owner, indeed, were obtained from the same manufacturer, and (2) that the legality of use of the trademark in the country where the importer had obtained the goods justified its concurrent use in this country.[17] The decision followed

[17] The court also rejected the argument that the display of the respective company names (Bourjois vis-a-vis Wertheimer) on the labelling precluded confusion of the public. The decision was unanimous and one of Justice Holmes' admirably short opinions of less than three pages. The author of this opinion is embarassed by any comparison.

the generally accepted theory that the function of a trademark is to identify the producer, the source which stands behind the goods sold under the mark, and not the product itself. Bourjois (NY) did not stand behind the goods sold by Katzel, whereas purchasers would think, that it did.

The Supreme Court did not mention the § 27 exclusion provision of the trademark statute in *Katzel* since it was not an issue directly raised in that case. However, the question of exclusion by Customs under § 27 arose shortly thereafter in *A. Bourjois & Co., Inc.* v. *Aldridge,* 263 U.S. 675 (1923). The underlying facts of Aldridge closely parallel those in *Katzel,* except that the trademark involved was MANON LESCAUT for face powder, another mark Bourjois (NY) had acquired from Wertheimer. Unlike *Katzel,* this time Bourjois sought relief against the Collector of Customs (Aldridge) at the port of New York under § 27 of the trademark statute, as well as against the importer, Le Banart Import Co. The district court refused to grant an injunction to require Customs to bar MANON LESCAUT powder (acquired abroad from Wertheimer) from entry by the importer. On appeal, the Second Circuit certified the following two questions to the Supreme Court:

> (1) Is the sale in the United States of Wertheimer's Manon Lescaut powder an infringment of plaintiff's registered trademarks?
> (2) Is the collector, by section 27 of the Trade-Mark Law, required to exclude from entry genuine Manon Lescaut powder so as aforesaid made in France?

A. Bourjois & Co., v. *Inc.* v. *Aldridge,* 292 F. 1013, 1014 (2d Cir. 1922).

In a memorandum opinion, the Supreme Court answered both questions in the affirmative, "upon the authority of *A. Bourjois* v. *Katzel,* 260 U.S. 689, the defendant [Aldridge] not objecting." Again, infringement was found with respect to arguably "genuine" goods. Not only was the product identical to that of the U.S. trademark owner sold under the same mark, indeed, obtained from the same manufacturer, but also the product was legally sold under the mark at the place of origin and purchase. Nevertheless, Customs was directed to exclude this type of "genuine" goods under § 27.

It is argued that had the Supreme Court decision in the *Katzel* case been handed down sooner, § 1526 would not have been enacted. However, the statute was enacted, and, as the discussion above indicates, it resulted in a statutory bar not limited to the facts of *Katzel,* indeed, not intended to be limited to technical determinations of infringement.

A contemporary judicial assessment of congressional intent is found in *Sturges* v. *Clarke D. Pease, Inc.,* 48 F.2d 1036 (2d Cir. 1931), a case in which the plaintiff sought to import for personal use a secondhand Hispano-Suiza automobile which bore the trademark "H-S." The U.S. rights in that mark had been acquired by Pease,

who refused to allow the "genuine" article to be imported. Judge A. Hand, addressing the argument that § 1526 should be narrowly construed, since it would not have been enacted at all had *Katzel* been decided prior thereto, stated:

> But this fact does not settle the scope of the act.
> * * * The object of this drastic statute is to protect the owner of a foreign trademark from competition in respect to goods bearing the mark. * * * Sales of cars bearing the foreign trade-mark and imported without the consent of Clarke D. Pease, Inc., interfere with its right to control the use of the mark in this country which was the apparent purpose of the congressional legislation.
> * * * Byers are likely to purchase Hispano-Suiza cars from Clarke D. Pease, Inc., in order to secure the mark if they cannot otherwise obtain that advantage. If they are allowed to import for personal use without its consent, Clarke D. Pease, Inc., may certainly lose customers who would be willing to buy from them rather than possess cars bearing no trade-mark. To obtain such advantages the local owner of the foreign mark is given control of the importation of all cars bearing it.

48 F.2d at 1037.

It seems quite clear that Judge Hand did not consider that the statute was limited in scope to the facts of *Katzel*. In his view, the statute was "drastic" in that it gave a trademark owner the right to "control" imports of "all" goods bearing the mark to which it owned U.S. rights, regardless of the relationship between the U.S. trademark owner and the foreign producer.

Despite the reversal of *Katzel* and the holding in *Aldridge* by the Supreme Court, which it is argued made § 1526 unnecessary, the provision has not been nullified, but has remained part of the customs law. Indeed, a proposal to eliminate § 1526 from the customs law, because the Trademark Act of 1946 would carry § 27 forward as part of the new statute, was unsuccessful.[18]

We conclude that no limitations, based on indications of congressional intent at the time of enactment, can be read into the statute itself.

B

Administrative Interpretation

Turning to the government's second argument, it is urged that the current Customs regulations reflect a long standing administrative interpretation of the statutory provision and, thus, should be accepted as countrolling on this issue. Our review of the series of regulations issued by Customs since 1923, together with administrative practice, Treasury rulings, and correspondence between various Customs officials and members of Congress, indicates that Cus-

[18] Old § 27 became § 42 (15 U.S.C. § 1124) in the 1946 statute.

toms has had and continues to have changing views *of the role of Customs* in enforcing § 1526(a) on behalf of owners of registered U.S. trademarks (as well as in enforcing the import exclusion in the Trademark Act of 1905 and 1946).

The first regulations following enactment of § 1526 were issued by Customs in 1923. As noted in Judge Restáni's opinion, these regulations offer little insight into the agency's interpretation, in that they merely recognized that U.S. owners of registered trademarks were entitled to the protection of § 1526. (Customs Regulations of 1923, Articles 475–480.) Upon reenactment of § 1526 as part of the Tariff Act of 1930,[19] new regulations were issued as follows:

> Prohibition of entry.—Entry is prohibited of imported merchandise *bearing a genuine trade-mark* when such trade-mark is recorded with the Treasury Department and registered under the trade-mark law of February 20, 1905, if compliance is had with all provisions of section 526 of the tariff act of 1930, provided the period of protection for such trade-mark has not expired. [Emphasis added.]

Customs Regulations of 1931, Article 513(a). The bar against goods with "genuine" marks appears to have been considered at that time, by customs, to be absolute. Without the U.S. trademark owner's consent, all goods, even with "genuine" marks, were barred. *Sturges, supra.*

The first inroad on that concept is found in the 1936 regulations. It must first be noted that Customs regulations have dealt with exclusions based on trademarks in a single set of regulations, whether under § 1526 or under the trademark statute. In the 1936 regulations, goods barred under § 1526 were stated to be deemed for purposes of the regulations to bear a trademark which "copies or simulates" a protected trademark (language taken from the trademark statute). Imported goods were no longer subject to either the trademark or customs law prohibition in the absence of the trademark owner's consent "if such foreign trade-mark * * * and such United States trade-mark * * * are owned by the same person, partnership, association, or corporation."

In 1953, Customs put into the regulations a much broader limitation under 19 C.F.R. § 11.14. Importation was no longer to be barred by Customs in the absence of the trademark owner's consent if the foreign trademark was owned by a "related company" (as defined in § 45 of the Trademark Act of 1946) of the U.S. owner, and disclosure of such related companies was required. The defini-

[19] The following remarks of Senator Reed at that time are relied on by the government as indicating Congress' understanding of the provision:

> At the present time the tariff laws forbid the importation of an article bearing a trade-mark registered in America unless the owner of that trade-mark consents in writing to the importation. Obviously the purpose of that provision is to protect the American owner of the trade-mark against importations of articles which have been stamped with his mark *without his consent*. [Emphasis added.]

71 Cong. Rec. 3873 (1929).

We think this remark is ambiguous at best and of little significance to this case. "[W]ithout his consent" could depend from either "importations" or "stamped," which changes the meaning completely.

tion in § 45 (15 U.S.C. § 1127) covers *licensees* as well as commonly owned companies.[20]

Despite these regulations, some U.S. trademark owners continued to enjoy the exclusion of imports of "genuine" goods from abroad apparently by reason of earlier recordation of a mark before disclosure of affiliates was required. Such a situation was revealed in *United States* v. *Guerlain, Inc.*, 155 F. Supp. 77, 114 USPQ 223 (S.D.N.Y. 1957). A U.S. distributor, Guerlain, had utilized the exclusionary provisions of § 1526(a) to prevent importation by others of the same goods which Guerlain was importing. In the district court, the United States successfully maintained that Guerlain's action was in violation of § 2 of the Sherman Act by monopolizing or attemping to monopolize the goods sold under the trademark, i.e., intrabrand competition in the subject goods was prevented.[21] Had this ruling stood, Vivitar would not be advancing the interpretation of § 1526 which it is urging today. However, during the pendency of the case before the Supreme Court, the Justice Department moved to vacate the judgments of the district court in its favor to enable it to move in that court to dismiss. As reasons for such action, the government stated that it was *the practice of Customs* to allow such exclusions of "genuine" goods and that the government would seek legislation to clarify that the products of an affiliate of the U.S. trademark owner were not subject to the exclusion remedy. The Supreme Court granted the government's motion. 358 U.S. 915 (1958). Efforts to obtain such legislation proved unfruitful. *See* H.R. 7234, 86th Cong., 1st Sess. (1959).

In 1959, apparently as a result of the *Guerlain* situation, Customs expressly went back to the more limited 1936 exception, i.e., importation was allowed without consent only if the "same entity" owned rights here and abroad. *See* J.F. Atwood, *Import Restrictions on Trademarked Merchandise—The Role of the United States Bureau of Customs,* 59 Trademark Reporter 301, 307 (1969). It appears from Treasury Decision T.D. 69-12(2) (1969) in the record, however, that the "same entity" requirement was satisfied, in the view of Customs, by a parent/subsidiary relationship. However, disclosure of foreign relationship was not required in the 1959 regulations except for principal and agent, 19 C.F.R. § 11.15(a) (1959), so that Customs could not uniformly enforce the limitations.

In 1972, the regulations were again revised. The new regulations, 19 C.F.R. § 133.21, carried forward the "same entity" limitation and added limitations explicitly for (1) parent/subsidiary corporations and other common ownership of the owners of the foreign and U.S. trademarks (§ 133.21(c)(2)) and (2) foreign licensees of the U.S. com-

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[20] 15 U.S.C. § 1127 defines related company as follows:

The term "related company" means any person who legitimately controls or is controlled by the registrant or applicant for registration in respect to the nature and quality of the goods or services in connection with which the mark is used.

[21] Two other defendants were similarly charged with respect to other goods and marks. The cases were consolidated because of the common issue. There was no charge of conspiracy among the defendants.

pany which is the owner of a U.S. trademark (§ 133.21(c)(3)). (The regulation does not distinguish between a licensee of U.S. rights or foreign rights). Disclosure of these names is required.

With respect to actual administration practice, during some years Customs acted to exclude goods which, under its regulations, should not have been excluded because it lacked information to implement its regulations. Thus, trademark recordants prior to 1953 were treated differently from recordants between 1953–1959 and those after 1959 differently from those before that date. Whether earlier recordants are not treated the same today as those after 1972, we do not know. In the above cited article by J.F. Atwood, a customs law specialist at the then Bureau of Customs, the problem of lack of uniform administration is discussed. 59 Trademark Reporter at 310–11. One section is entitled "The Related Company Riddle" and concludes with the statement:

> Thus related companies are no longer denied full protection merely because they are affiliated with a foreign firm, or because control as to the nature and quality of the trademark [sic, goods sold under trademark] is exercised, but only because there is common ownership or control.

59 Trademark Reporter at 317. Work on clarifying the position of Customs with respect to bars against related companies was proceeding at that time (1969).

Similarly, a comprehensive study is being made at this time with respect to genuine goods in the grey market. *See* Solicitation of Economic Data Notice, 49 Fed. Reg. 21,453–56 (1984). As stated therein:

> Because of the controversy and considerable interest on both sides of the issue expressed in many letters to, and requests for meetings with, the Executive Branch Departments and Agencies, the Cabinet Council on Commerce and Trade's [CCCT] Working Group on Intellectual Property [WGIP] is studying the issues relating to parallel imports. The WGIP may make a recommendation to the CCCT with respect to parallel imports of trademark products when it concludes its study.

While the notice does not propose new regulations, we discern a continued uncertainty within the executive branch as to the meaning of the exclusion provisions.

Finally, we note that Customs joined with the Department of Justice in filing an amicus brief in 1983 in another "grey market" goods case entitled *Bell & Howell: Mamiya Co.* v. *Masel Supply Co.*, 719 F.2d 42 (2d Cir. 1983), in which the government urged the court to construe § 1526(a) "in accord with the normal meaning of the statutory language" and repudiated the position urged here.

While the government has cited other official or semi-official statements of Customs' interpretation of § 1526(a), we do not see that these materials help its "long standing administration" argument here. Rather than a consistent policy of administration over

the years, reflecting an unvarying interpretation of the statute, it appears that Customs has had continuing questions concerning the reading of the statute. It is evident that, over the years, Customs has attempted to adjust its regulations to reflect the few judicial decisions which interpreted the law prior to 1972. The regulations, while imposing the "same entity" limitation since 1936, have not been consistent in respect of what other limitations should be recognized nor has consistency been unequivocally shown in enforcement. Thus, like the legislative history argument, the "long standing administrative interpretation" argument of the government and intervenor does not afford a basis for a definitive statutory interpretation.

C

Implied Ratification

Finally, the government argues that Congress has ratified the interpretation given to the statute by the Customs regulations. As early as 1954, Treasury informed Congress that the overlap of 19 U.S.C. § 1526 and 15 U.S.C. § 1124 "was confusing," and that a proposed amendment of § 1526 to specify that exclusion was not authorized with respect to commonly owned companies, agents, licensees, etc., would endorse Customs' interpretation. The amendment was not passed.

In 1978, Congress did amend § 1526 to add an exemption from the statutory bar against importation with respect to goods accompanying travellers for personal use (19 U.S.C. § 1526(d)). The House Report (H.R. Rep. 521, 95th Cong. 1st Sess. 27 (1977)) states, albeit incorrectly, that the Customs Service had consistently interpreted § 1526 as not encompassing imports which were authorized by the U.S. trademark owner to be produced abroad. Nothing in any materials we have been able to find indicates in any way that the limitations set forth in the Customs regulations were endorsed or incorporated into the statute. Several problems concerning individual travellers were being addressed, of which the bar to bringing in "genuine" goods for personal use was one of the most annoying.

From these events, appellees argue that Congress must be deemed to have, in effect, incorporated the limitations of the 1972 regulations into the statute because it was aware of them. We cannot agree. Legislation by total silence is too tenuous a theory to merit extended discussion.

IV

Interrelationship of Statute and Regulations

Vivitar attacks the regulations as contrary to § 1526(a) and, therefore, invalid. In Vivitar's view, the statute, but not the regulations, provides an absolute bar to importation of goods manufac-

tured abroad which bear a trademark identical to one registered in the U.S. by a U.S. entity unless the latter consents. Thus, per Vivitar, the regulations unlawfully limit the rights of the trademark owner given by the statute.

It appears that Vivitar's position is based on an erroneous understanding as to the structure of the statute and the nature of the subject regulations. Vivitar's arguments are premised on the assumption that the regulations set the limits of its right to exclude under § 1526(a). This premise erroneously treats the regulations as *legislative* rules having the force of law. Congress may, of course, entrust an agency with the duty to exercise its judgment under guidelines set forth in a statute, and to fill in the extent of protection thereunder. *See, e.g., Batterton* v. *Francis,* 432 U.S. 416, 425 (1977). However, we find no language in the statute by which Congress delegated such *legislative* authority to the Secretary of Treasury in connection with administration of § 1526(a).[22] Without such authority, Customs regulations cannot affect the actual scope of a trademark owner's rights vis-a-vis an importer under the statute. *See* 2 K. Davis, *Administrative Law Treatise* § 7.8 (2d ed. 1979).

Regardless of whether Customs excludes or does not exclude particular imports, the courts must independently determine whether the importation is or is not precluded by the statute. In connection with exclusion under the trademark statute (15 U.S.C. § 1124), Customs' administrative determination that importations bear a mark that is not likely to cause confusion with a recorded mark has no effect on a trademark owner's right to obtain a judicial determination of infringement and, thereafter, to have such goods excluded (or vice versa). *See La Societe Anonyme des Parfums LeGalion* v. *Jean Patou, Inc.,* 495 F.2d 1265, 181 USPQ 545 (2d Cir. 1974); *Lois Jeans & Jackets, U.S.A., Inc.* v. *United States,* 5 CIT 238, 566 F. Supp. 1523 (1983) (injunction granted against exclusion pending determination of infringement in district court); *Holland* v. *C. & A. Import Corp.,* 8 F. Supp. 259, 261 (S.D.N.Y. 1934); *see also Humble Oil & Refining Co.* v. *Sekisui Chemical Co.,* 165 USPQ 597, 604–605 (TTAB 1970) (Customs defers to decision of TTAB or other tribunal). Similarly, Customs' decision, as expressed in the subject regulations, not to exclude grey market goods does not control on the question of whether particular goods should or should not be excluded. A trademark owner is entitled, as in the "confusingly similar" mark case, to pursue private remedies against the importer and, if successful, to have such grey market goods excluded.[23]

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[22] The regulations were issued pursuant to general authority under 19 U.S.C. § 1624. In contrast, § 1526(d)(2) contains a specific delegation of legislative type authority to the Secretary with respect to importations for personal use and specific authority to issue regulations in § 1526(d)(4). In some instances legislative authority may be found without a specific grant if it is clear from "the language and logic of the [statute] an its legislative history" that such authority was contemplated. *Chrysler Corp;.* v. *Brown,* 441 U.S. 281, 308 (1979).

[23] If we turn to regulations of Customs related to other statutory exclusions, the non-legislative nature of all of these regulations becomes readily apparent. Trade names (i.e. company names) may be recorded only if used for six months. Nothing in 15 U.S.C. 1124 establishes this requirement. No automatic exclusion is provided at all pursuant to 15 U.S.C. 1125(b) which relates to unfair competition cases (§ 43(a) of the Lanham Act, 15 U.S.C. 1125(a)).

With these considerations in mind, we conclude that the regulations do no more than define Customs' role in initiating administrative enforcement of the statute. Viewed in this manner, it is apparent that the regulations are not *contrary* to the statute in the sense that goods are being routinely excluded which should be admitted or *vice versa*. Nor has any instance been brought to our attention where, after a judicial determination that imports should be excluded, Customs refused thereafter to undertake to act accordingly. Vivitar's complaint is simply that the regulations do not go far enough in automatically excluding all types of grey market importations.

In our view, Customs is not required to exclude all grey market goods *sua sponte*. Congress could not have foreseen all possibilities in international trade relationships at the time of enacting the statute. The variations of the grey market are myriad.[24] While we have rejected the government's argument that the statute must be interpreted as limited by the regulations, we must also reject the view that the statute may not have *any* implied limitations or that general principles such as "agency," "piercing the corporate veil." "sham" transactions, "estoppel," "fraud" or other defenses could not defeat an apparent right to invoke the statute.

In any event, if we return to the statute, U.S. trademark owners are provided therein essentially with a private remedy, which is properly being tested in the federal district courts with increasing frequency and where issues, such as those raised above, are being resolved. It appears to us that § 1526(a) may be developing on a case-by-case basis into protection against *sui generis* types of unfair competition in international trade.[25] That Customs regulations do not provide for exclusion initially in a case where the trademark owner ultimately prevails in federal district court does not mean that regulations must be declared invalid. Where protection under the statute is unclear or depends upon resolution of complex factual situations, Customs may decline to impose *Ssau sponte* the extreme sanction of exclusion and leave such cases for initial determination by the district courts under the private remedies provided to the trademark owner in § 1526(c).[26] Indeed, the fact that the trademark owner is provided with the remedies of injunction and damages against private parties who have improperly dealt in

[24] For example, the U.S. and foreign trademark rights may be owned by the same entity or by related companies, or by wholly separate companies. The goods of the U.S. owner may be imported and may be identical to, or different from, the parallel import. Goods may be produced in U.S. by the U.S. trademark owner and different goods produced abroad by the U.S. owner or by its affiliate. Services and warranties may or may not be same here and abroad. A foreign licensee (i.e., related company) may be required by foreign law and may not be subject to meaningful control by the U.S. owner. A number of such actual variations are indicated by the cases cited in this opinion; others are discussed in Takamatsu, *Parallel Importation of Trademarked Goods: A Comparative Analysis*, 5 Wash. L. Rev. 433 (1982).

[25] *Selchow & Righter Co.* v. *Godex Corp.*, No. 84-8264 (S.D. Fla. 1985); *Osawa & Co.* v. *B. & H. Photo*, 589 F. Supp. 1163, 223 USPQ 124 (S.D.N.Y. 1984); *Bell & Howell: Mamiya Co.* v. *Masel Supply Co.*, 589 F. Supp. 1063, 215 USPQ 870 (E.D.N.Y. 1982), *Parfums Stern, Inc.* v. *Customs Service*, 475 F. Supp. 416 (S.D. Fla. 1983); *Model Rectifier Corp.* v. *Takachiho Int'l, Inc.*, 221 USPQ 502 (9th Cir. 1983).

[26] *See Lois Jeans & Jackets, U.S.A., Inc.* v. *United States*, 5 CIT 238, 244, 566 F. Supp. 1523, 1528 (1983) ("judicial expertise * * * is clearly in the District Court.").

goods in the United States negates the idea that agency-initiated action in all cases is expected. Further, the absence of a provision for expeditious relief and monetary compensation for an importer whose goods are improperly excluded cautions against automatic administrative exclusion in such cases.[27]

Accordingly, we hold the current regulations to be valid but not controlling with respect to the scope of protection of 19 U.S.C. § 1526(a). To obtain any additional protection, Vivitar must first pursue a determination of its alleged rights against persons engaging in parallel importation of VIVITAR photographic equipment in federal district court, and, if successful, is entitled to have the parallel imports excluded by Customs.

Conclusion

We conclude that the Court of International Trade had exclusive jurisdiction to determine the validity of the current regulations administering 19 U.S.C. § 1526(a). We further conclude that the scope of the statutory protection afforded to a U.S. trademark owner under 19 U.S.C. § 1526 is not fixed by the Customs regulations. The regulations, 19 CFR § 133.21, are upheld as a reasonable exercise of administratively inititated enforcement. The judgment of the Court of International Trade is *affirmed.*

AFFIRMED

APPENDIX

§ 1526. Merchandise bearing American trade-mark

(a) Importation prohibited

Except as provided in subsection (d) of this section, it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, under the provisions of sections 81 to 109 of title 15, and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury, in the manner provided in section 106 of said title 15, unless written consent of the owner of such trademark is produced at the time of making entry.

(b) Seizure and forfeiture

Any such merchandise imported into the United States in violation of the provisions of this section shall be subject to seizure and forfeiture for violation of the customs laws.

(c) Injunction and damages

Any person dealing in any such merchandise may be enjoined from dealing therein within the United States or may be required to export or destroy such merchandise or to remove or obliterate such trademark and shall be liable for the same dam-

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[27] *Cf.* 19 C.F.R. § 133.43 (copyright exclusion regulations which require, *inter alia,* U.S. Copyright owner to post a bond conditioned to hold the importer or owner of the imported articles harmless from any loss or damage resulting from Customs detention).

ages and profits provided for wrongful use of a trade-mark, under the provisions of sections 81 to 109 of title 15.

(d) Exemptions; publication in Federal Register; forfeitures; rules and regulations

(1) The trademark provisions of this section and section 1124 of title 15, do not apply to the importation of articles accompanying any person arriving in the United States when such articles are for his personal use and not for sale if (A) such articles are within the limits of types and quantities determined by the Secretary pursuant to paragraph (2) of this subsection, and (B) such person has not been granted an exemption under this subsection within thirty days immediately preceding his arrival.

(2) The Secretary shall determine and publish in the Federal Register lists of the types of articles and the quantities of each which shall be entitled to the exemption provided by this subsection. In determining such quantities of particular types of trade-marked articles, the Secretary shall give such consideration as he deems necessary to the numbers of such articles usually purchased at retail for personal use.

(3) If any article which has been exempted from the restrictions on importation of the trade-mark laws under this subsection is sold within one year after the date of importation, such article, or its value (to be recovered from the importer), is subject to forfeiture. A sale pursuant to a judicial order or in liquidation of the estate of a decedent is not subject to the provisions of this paragraph.

(4) The Secretary may prescribe such rules and regulations as may be necessary to carry out the provisions of this subsection.

(e) Merchandise bearing counterfeit mark; seizure and forfeiture; disposition of seized goods

Any such merchandise bearing a counterfeit mark (within the meaning of section 1127 of title 15) imported into the United States in violation of the provisions of section 1124 of title 15, shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws. Upon seizure of such merchandise, the Secretary shall notify the owner of the trademark, and shall, after forfeiture, obliterate the trademark where feasible and dispose of the goods seized—

(1) by delivery to such Federal, State, and local government agencies as in the opinion of the Secretary have a need for such merchandise,

(2) by gift to such eleemosynary institutions as in the opinion of the Secretary have a need for such merchandise,

(3) more than 1 year after the date of forfeiture, by sale by appropriate customs officers at public auction under such regulations as the Secretary prescribes, except that before making any such sale the Secretary shall determine that no Federal, State, or local government agency or eleemosynary institution has established a need for such merchandise under paragraph (1) or (2), or

(4) if the merchandise is unsafe or a hazard to health, by destruction.

Appeal No. 84-1638

VIVITAR CORP., APPELLANT *v.* THE UNITED STATES, ET AL., APPELLEES AND 47TH STREET PHOTO, INC., INTERVENOR

DAVIS, *Circuit Judge*, concurring in the result.

On the jurisdiction of the Court of International Trade (CIT), I agree with the court's opinion, adding only the citation of *American Association of Exporters* v. *United States,* 751 F.2d 1239, 1244-46 (Fed. Cir. 1985), a recent decision of this court plowing much of the ground of the CIT's current power.

On the merits, I agree with the majority that the challenged Customs regulation is valid because Customs could properly, for its

own administrative and enforcement purposes, provide that it would exclude less than all the trademarked goods that *might* turn out to be covered by § 1526(a), *i.e.*, that Customs' own enforcement need not be coterminous with the full reach of that statute as it applies between private persons. Unlike the majority, I find that since 1936 the Customs regulations have been substantially consistent as they apply to imported goods comparable to those Vivitars says should be excluded in its case.

I do not join the court's opinion mainly because I think it is wholly inappropriate for this court to go further and to delve (as it does extensively in Part III of the majority opinion) into bases for construing § 1526(a) as that legislation applies between private parties. That type of discussion should be left to the district courts and the regional courts of appeals when they are faced with a suit (under 19 U.S.C. § 1526(c), 28 U.S.C. §§ 1331 and 1338) by the trademark owner against persons dealing in this country in merchandise said to have been imported in violation of § 1526(a). The CIT will never deal with those private-party suits and issues, and this court can reach them only if they happen to be joined with an appealed patent claim. 28 U.S.C. § 1295(a)(1). To me, it is needless and gratuitous for this court, in this international trade case coming from the CIT, to indulge in lengthy dicta bearing on the full scope of § 1526(a), *obiter dicta* which will not bind any court in a private suit but which simply tends to confuse the trademark bar.

I certainly agree that we should make it clear that the Customs regulation does not *necessarily* cover the full sweep of § 1526(a), but it is not for us to indicate affirmatively (as the majority does), even in dicta, that that full sweep is actually wider than the regulation. The entire matter should be left to further litigation with which we can only be haphazardly concerned, if at all. All that we *hold* in this case is that the Customs regulation is now valid as a Customs enforcement regulation. That is quite enough.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao	Gregory W. Carman
Morgan Ford	Jane A. Restani
James L. Watson	Dominick L. DiCarlo

Senior Judges

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 85-48)

ATOCHEM, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-2-00163

Before CARMAN, *Judge.*

MEMORANDUM OPINION AND ORDER

[Plaintiff's application for attorney's fees denied.]

(Decided April 26, 1985)

Donohue & Donohue (*John M. Peterson, Kathleen C. Inguaggiato* and *Margaret R. Polito* on the application) for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*J. Kevin Horgan* on the application) for the defendant.

CARMAN, *Judge:* Before the Court is plaintiff's application for an award of attorney's fees pursuant to the provisions of the Equal Access to Justice Act of 1980, 28 U.S.C. § 2412(b) (1982). Defendant opposes the application in all its respects.

The underlying controversy pertains to a decision by the Secretary of the Treasury dated May 14, 1979, pursuant to the Antidumping Act of 1921, ch. 14, 42 Stat. 11, 15, *repealed by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106, 93 Stat. 144, 193, determining that perchlorethylene from France [1] was being sold in the United States at less than fair value and ordering the assessment of antidumping duties. *See* T.D. 79-149, 13 Cust. Bull. 348 (1979). The dumping finding continued in effect, and on August 31, 1982, plaintiff's corporate predecessor, Chloe Chimie, filed a formal revocation application with the International Trade Administration (ITA) of the Department of Commerce.[2] On November 17, 1982, the

[1] Perchlorethylene is a "clear, water-white liquid at ordinary temperature with a sweet odor and is completely capable of being mixed with most organic liquids." "It is a chlorinated solvent used mainly for drycleaning of clothing, but is also used in other applications such as vapor degreasing of metals." 48 Fed. Reg. 37679 (1983).

[2] By virtue of Reorganization Plan Number 3 of 1979, 44 Fed. Reg. 68,273 (1979), made effective as of January 2, 1980 by Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980), responsibility for the administration of the antidumping law was transferred from the Treasury Secretary to the Department of Commerce.

Under Commerce Department regulations, an extant dumping finding may be revoked when, in the Secretary's estimation, a showing is made that less than fair value sales have ceased and are not likely to resume. See 19 C.F.R. § 353.54(a), (b), (e) (1984).

ITA published the preliminary results from its periodic review under 19 U.S.C. § 1675(a) (1982) (section 751 review). *See* 47 Fed. Reg. 51,779 (1982). That notice stated that although the firm did not ship perchlorethylene for over 3 years, under the "Department's minimum requirements," 4 years of no shipments was necessary. On April 20, 1983, the ITA published the final results of the section 751 review. *See* 48 Fed. Reg. 16,929 (1983). Revocation was denied because the period of no shipments had not reached 4 years. The notice also stated that it would consider the firm's revocation request in its next administrative review, which the ITA "expect[ed] to complete * * * in an expeditious manner."

On August 19, 1983, the ITA published the preliminary results from its next 751 review. *See* 48 Fed. Reg. 37,678 (1983). The notice, in part dubbed "Tentative Determination to Revoke," stated that there had been no perchlorethylene shipments for 4 years and that the other requirements of 19 C.F.R. § 353.54(e) had been satisfied. On February 1, 1984, however, the ITA published the final results of its second 751 review and denied the request for revocation.[3] *See* 49 Fed. Reg. 4,029 (1984). The notice stated it was the ITA's intention to examine plaintiff's exports for the period between May 19, 1983 and August 19, 1983, and to begin immediately the next review.

It is this failure by the ITA to revoke Treasury Decision 79-149 that forms the basis of the present application for attorney's fees. Plaintiff argues that through telephone assurances, ITA policy declarations, prior practice, as well as the August 19, 1983 "Tentative Determination to Revoke," it anticipated the revocation of the dumping finding in the final results of the second 751 review. With this expectation, according to plaintiff, expensive marketing and sales preparations were made, all of which were severely disrupted by the failure to revoke the dumping finding. Plaintiff labels its treatment at the hands of the ITA "unprecedented, discriminatory and unlawful."

Defendant, explaining the agency's actions, states that after the publication of the preliminary results and "Tentative Determination to Revoke" on August 19, 1983, both plaintiff and the domestic petitioners lodged objections. Plaintiff requested that the finding be revoked only as to Atochem—the only known exporter of French perchlorethylene—but not as to any other French producer. Because of these objections, defendant states, the ITA believed that another administrative review was required under 19 C.F.R. § 353.54(f) (1984).[4] Under that regulation, before the Secretary may

[3] Shortly after publication of the Tentative Determination to Revoke, the ITA requested that plaintiff confirm that no shipments were made through August 19, 1983—the date of publication of the preliminary results. Evidently, the ITA was seeking information pertaining to the interim period between the end of the first 751 review and the publication of the Tentative Determination to Revoke.

[4] 19 C.F.R. § 353.54(f) provides in part:

Final determination. As soon as possible after publication of a "Notice of Tentative Determination to Revoke or Terminate" the Secretary will determine whether final revocation or termination is warranted.

Continued

revoke a dumping finding, it is necessary to prove no sales at less than fair value right up to the date of publication of the Tentative Determination to Revoke. Thus, the ITA stated it would conduct an additional administrative review covering the period from May 19, 1983 until August 19, 1983.[5]

On February 6, 1984, plaintiff filed a civil action in the Court of International Trade seeking a declaration of the unlawfulness of the ITA's actions. On June 18, 1984, plaintiff submitted its brief under Rule 56.1 of the Rules of this Court. On August 7, 1984, after one time extension had been granted, the defendant filed a cross-motion to dismiss this action as moot, citing the imminent revocation of Treasury Decision 79-149. Finally, on August 15, 1984, the ITA published a notice revoking the dumping finding. *See* 49 Fed. Reg. 32,635 (1984).

Plaintiff opposed the motion to dismiss as moot and the matter was set down for a hearing. Immediately preceding oral argument, however, plaintiff and defendant stipulated that the matter was indeed moot. Plaintiff, nevertheless, persists in its attorney's fees application.

Discussion

A plaintiff seeking to recover attorney's fees against the United States has a two-fold barrier to overcome: the American Rule and the sovereign immunity doctrine.

In contrast to practice before English courts, parties in United States litigation have traditionally borne their own legal fees. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 717–18 (1967). This restriction on fee shifting, the so-called American Rule, is, however, subject to certain statutory and judicially created exceptions. *See, e.g.,* Civil Rights Act of 1964, 42 U.S.C. § 2000a–3(b) (1982); *Sprague* v. *Ticonic National Bank,* 307 U.S. 161, 167 (1939) (common fund exception).

Plaintiff in the instant matter proceeds under another well-recognized exception to the American Rule; the bad faith exception. This equitable doctrine holds that "attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *F.D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.,* 417 U.S. 116, 129 (1974) (footnote omitted).

Plaintiff maintains the ITA, by its actions with respect to the revocation proceedings, displayed and "unjustified, obstinate, and bad faith refusal to accord plaintiff its rights under the antidump-

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* * * [T]he Secretary may determine that a final revocation or termination is warranted only if the firm involved provides information showing no sales at less than fair value with respect to the subject merchandise up to the date of publication of the "Notice of Tentative Determination to Revoke or Terminate."

[5] Defendant has submitted a declaration by the staff attorney assigned to the Commerce Department team responsible for the instant administrative reviews. The staff attorney declares that the Department has, on occasion, used a "short-cut" procedure in revoking dumping findings. But this shortened procedure was employed only where no objections were lodged against the "Tentative Determination to Revoke." According to the staff attorney, because objections were made in this case Commerce did not use the short-cut method.

ing statute and accompanying regulations." Plaintiff's Application for an Award of Attorney's Fees, at 1.

Regarding the traditional sovereign immunity bar, plaintiff points to the Equal Access to Justice Act of 1980, 28 U.S.C. § 2412(b) (1982).[6] That law subjects the United States to the assessment of legal fees "to the same extent that any other party would be liable under the common law." *Id.*

There is no question that an agency's conduct of an administrative proceeding may form the basis of an application to a court under the Equal Access to Justice Act. *See McQuiston* v. *Marsh,* 707 F.2d 1082, 1086 (9th Cir. 1983); Note, *Awards of Attorney's Fees in the Federal Courts,* 56 St. John's L. Rev. 277, 352 & n.336 (1982). It is also settled that the Act applies to actions in the Court of International Trade. *See Bar Bea Truck Leasing Co.* v. *United States,* 4 CIT 137 (1982).

The question squarely presented to the Court is whether the circumstances surrounding the ITA's refusal to revoke the dumping finding in the final results of the second 751 review bear the traditional indicators that trigger the bad faith exception. Resolution of that issue rests within the sound discretion of the Court. *See United States* v. *2116 Boxes of Boned Beef, Weighing Approximately 154,121 Pounds,* 726 F.2d 1481, 1488 (10th Cir.) , *cert. denied*, 105 S. Ct. 105 (1984).

A survey of cases in the area demonstrates that the ITA's actions were not of the kind that courts have traditionally deemed vexatious, wanton or oppressive. In *International Union of Petroleum & Industrial Workers* v. *Western Union Maintenance, Inc.,* 707 F.2d 425 (9th Cir. 1983), the court stated that an "unjustified refusal to abide by an arbitrator's award may equate to an act taken in bad faith, vexatiously or for oppressive reasons." *Id.* at 428. In that case, an arbitrator found in favor of a union and against the employer in a labor dispute involving a layoff. The employer, however, refused to abide by the arbitrator's decision, and the union was forced to petition the district court for confirmation. The Ninth Circuit, after rejecting the employer's contention that "justifiable grounds" existed to ignore the decision, stated that the award set forth "clear legal rights" which the employer was not at liberty to ignore. *Id.* at 429. The same court in another context has characterized the bad faith exception as applicable " 'only in exceptional cases and for dominating reasons of justice.' " *United States* v.

[6] Section 2414(b) reads in part:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys * * * to a prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specfically provides for such an award.

In addition, 28 U.S.C. § 2412(d)(1)(A) (1982) (repealed 1984), provides a more liberal standard for awards of attorney's fees against the United States. Under that provision, a prevailing party is entitled to a fee award unless the court finds that the position of the United States was "substantially justified" or that other "special circumstances" exist that would make an award unjust. *Id.* Atochem, however, does not satisfy the qualifications set forth in section 2414(d)(2)(B) and thus cannot avail itself of the more liberal standard.

Standard Oil Co. of California, 603 F.2d 100, 103 (9th Cir. 1979) (quoting 6 J. Moore, *Moore's Federal Practice* ¶54. 77[2], at 1709–10 (2d ed. 1972)).

The Second Circuit has indicated that actions taken "entirely without color and * * * asserted wantonly for purposes of harassment or delay" constitute bad faith for fee-shifting purposes. *Browning Debentures Holders' Committee* v. *DASA Corp.,* 560 F.2d 1078, 1088, (2d Cir. 1977); *see Weinberger* v. *Kendrick,* 698 F.2d 61, 80 (2d Cir. 1982), *cert. denied,* 104 S.Ct. 77 (1983); *Nemeroff* v. *Abelson,* 620 F.2d 339, 348 (2d Cir. 1980).

The District of Columbia Circuit, in evaluating a bad faith prosecution of a counterclaim, stated that the "fee-shifting sanction is invocable only for some dominating reason of justice," and that its standards are " 'necessarily stringent.' " *Lipsig* v. *National Student Marketing Corp.,* 663 F.2d 178, 180 (D.C. Cir. 1980) (per curiam) (quoting *Adams* v. *Carlson,* 521 F.2d 168, 170 (7th Cir. 1975)); *See also Massachusetts Union of Public Housing Tenants* v. *Pierce,* 577 F. Supp. 1499, 1503–04 (D.D.C. 1984); *Aero Corp.* v. *Department of the Navy,* 558 F. Supp. 404, 418–19 (D.D.C. 1983).

It is thus clear that a court should not lightly infer bad faith on the part of a litigant for purposes of attorney's fees awards. In this case, the Court finds that the ITA did not abuse clear legal rights nor engage in wanton, vexatious behavior. Indeed, the ITA, far from acting entirely without color of authority, was within the four corners of a regulatory standard.

Section 353.54 of the Commerce Regulations clearly empowers the Secretary to verify whether no sales at less than fair value have occurred *up to the date of publication of the notice of tentative revocation.* As discussed earlier, the ITA's second 751 review, covering the period between May 1, 1982 through May 18, 1983, resulted in the publication, on August 19, 1983, of the preliminary results including a tentative determination to revoke.

At that juncture, there was clearly a short "interim period" (the time between the end of the previous 751 review and the publication of the tentative determination to revoke), in this case the time between May 19, 1983 and August 19, 1983, wherein the ITA had not investigated whether sales at less than fair value occurred. Section 353.54(f) clearly provides that the "interim period," short though it may be, must be evaluated by the Secretary in the decision to revoke. With that regulatory injunctive in mind, the Secretary may conduct an administrative review of the "interim period."

Plaintiff's only assault on this practice is that other firms (alleged to be similarly situated) have had dumping findings revoked without a separate administrative review of the interim period. As indicated earlier, this "short-cut" method employed by the ITA is a matter of administrative leniency to be used in the discretion of the agency. Though the abridged procedure may have been used in every other similar case, it was not thereby metamorphosized into

an entitlement. This Court does not normally compel an exercise of discretion. *See Seaside Realty Corp.* v. *United States,* Slip Op. 85-40, at 4-5 (Apr. 3, 1985).

Even assuming, arguendo, that plaintiff should have been accorded the same treatment as other firms that benefited from the short-cut method, the ITA contends plaintiff's procedural posture should be distinguished from that of other firms. Indeed, it appears that the ITA did not waive administrative review of the interim period because plaintiff was not "similarly situated" with other firms that had received the benefit. As mentioned earlier, upon publication of the tentative determination to revoke, plaintiff and the domestic petitioners noted objections to the proposed revocation, maintaining that the dumping finding should be revoked only as to Atochem, the only known French producer of perchlorethylene, rather than as to all such French producers. If the ITA had proceeded to revoke the dumping finding in the face of noted objections, the revocation might have been subject to challenge for failure to comply with 19 C.F.R. 353.54(f). The ITA, therefore, found it inappropriate to revoke the dumping finding absent review of the interim period and strict compliance with the regulation. This is reflected in the affidavit filed by the staff attorney at the ITA who was responsible for conducting the administrative review. Defendant maintains that in the other cases where review of the interim period was waived, no objections were lodged against the tentative determination to revoke.

From the discussion above, the Court concludes that the ITA did not act in bad faith, vexatiously, with wantonness or for other oppressive reasons.[7] This is not an exceptional case where clear legal rights were ignored or actions were taken entirely without color of authority; nor do "dominating reasons of justice" exist warranting an award of attorney's fees to plaintiff.[8]

Plaintiff's application for an award of attorney's fees is accordingly denied.

So ordered.

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[7] Plaintiff has noted that the sole basis for its request for attorney's fees is the behavior of the ITA in conducting the administrative proceedings. The Department of Justice and its attorneys have, in plaintiff's words, been "completely professional."

[8] As noted earlier, on August 15, 1984, the ITA published a notice revoking the dumping finding at issue in this case. Immediately preceding oral argument on defendant's motion to dismiss this civil action as moot, plaintiff and defendant stipulated that the action was indeed moot. The Court approved the stipulation on March 1, 1985.

Based on this dismissal for mootness, defendant devoted a substantial part of its opposition to the application for attorney's fees to a discussion of why plaintiff was not a "prevailing party" within the meaning of 28 U.S.C. § 2412(b). Because the Court has found an absence of bad faith on the ITA's part, this issue is not essential to the disposition of the application. The Court notes, however, that it is fairly settled that a plaintiff may be a prevailing party where the suit has been rendered moot by virtue of the granting of the requested relief. *See Foster* v. *Boorstin,* 561 F.2d 340, 342-43 (D.C. Cir. 1977) (decided under 1964 Civil Rights Act). A court's inquiry before awarding legal fees, however, should extend into the causal relationship between the chronology of the lawsuit and the granting of the requested relief. This "catalyst" theory, used where it is contended that the filing and prosecution of a lawsuit served as the impetus for the tendering of the requested relief, though not reached in deciding this case, would nevertheless require substantially more evidence than is before the Court at present. A mere chronology of events will not suffice on this issue. *See Nadeau* v. *Helgmoe,* 581 F.2d 275, 281-82 (1st Cir. 1978).

(Slip Op. 85-49)

BADGER-POWHATAN, A DIVISION OF FIGGIE INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, ET AL., DEFENDANTS, RUBINETTERIE A. GIACOMINI, S.P.A., DEFENDANT-INTERVENOR

Court No. 85-3-00324

Before FORD, *Judge.*

ON PLAINTIFF'S APPLICATION FOR WRIT OF MANDAMUS AND CROSS-MOTION BY DEFENDANTS AND INTERVENOR FOR DISMISSAL

[Plaintiff's application for writ of mandamus denied; defendants' and intervenor's cross-motion to dismiss granted.]

(Decided April 29, 1985)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Charles A. St. Charles); Robin R. Starr, Figgie International, of counsel; for the plaintiff.

Richard K. Willard, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch *(Kevin C. Kennedy); Sandra M. Morewitz,* Office of General Counsel, U.S. Department of Commerce and *Marcia Sundeen,* Office of General Counsel, U.S. International Trade Commission, of counsel; for the defendants.

Law Office of Larry Klayman (Larry Klayman and *John M. Gurley)* for the intervenor.

FORD, *Judge:* Plaintiff, a domestic producer of brass fire protection products, seeks relief in the nature of mandamus to compel the United States Department of Commerce to amend antidumping order issued in the investigaiton of *Certain Brass Fire Protection Products from Italy.* 50 Fed. Reg. 8354. More specifically, plaintiff seeks to include within the scope of antidumping order five imported products found not to have caused material injury to a United States industry. Defendants and intervenor oppose plaintiff's application and cross-move for order dismissing plaintiff's complaint for failure to state a claim upon which relief can be granted. Jurisdiction is pursuant to 28 U.S.C. § 1518(i)(4).

The factual background of this action is not in dispute. On January 23, 1984, plaintiff filed an antidumping duty petition with the Department of Commerce and the International Trade Commission (ITC). The petition alleged that imports of brass interior fire protection products from Italy were being sold in the United States at less than fair value (LTFV) and causing material injury to the domestic industry. The International Trade Administration (ITA) published a notice of initiation of antidumping investigation on February 21, 1984. 49 Fed. Reg. 6396. Following an affirmative preliminary injury determination by the ITC, and ITA published affirmative preliminary determination of sales at less than fair value. 49 Fed. Reg. 28083.

On November 30, 1984, the ITA published its final affirmative LTFV sales determination. 49 Fed. Reg. 47066. In that determination, the scope of the investigation was described as follows:

> *Scope of Investigation*
>
> The merchandise covered by this investigation includes: Fire hose couplings (1½ and 2½ inch), fog/straight stream nozzles (1½ and 2½ inches), angle-type hose gate valves (1½ and 2½ inch), wedge-disc hose gate valves (2½ inch), single and double clapper siamese fire department connections (2½ inch inlets and 4 inch outlets), pressure restricting valves, the pressure regulating valves. This merchandise is currently classified under the following item numbers of the Tariff Schedules of the United States (Annotated): fire hose couplings—657.3540, fog/straight stream nozzles—680.1480, angle-type hose gate valves—68.1440, wedge-disc hose gate valves—680.1430, single and double clapper siamese fire department connections—680.1420, pressure restricting valves—680.1440, and pressure regulating valves—680.2740.

Having found domestic production of each of the seven articles subject to the investigation, the ITC, on February 27, 1985, issued a final affirmative injury determination with respect to two of the like products investigated.[1] 50 Fed. Reg. 7791. For the remaining five products, the ITC found no material injury to the respective domestic industries. Thereafter, on March 1, 1985, the ITA published an antidumping order directing the Customs Service to collect estimated antidumping duty deposits on the two products subject to the ITC's affirmative injury determinations. 50 Fed. Reg. 8354. It is from this order that plaintiff seeks relief in the nature of mandamus.

Section 731 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673 (1982), provides:

> Imposition of antidumping duties
> If—
>
> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be sold in the United States at less than its fair value, and
> (2) the Commission determines that—
> (A) an industry in the United States—
> (i) is materially injured, or
> (ii) is threatened with material injury, or
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise, then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the

[1] The two products found by the ITC to be materially injuring the corresponding United States Industries are single and double clapper siamese fire department connections and pressure restricting valves.

amount by which the foreign market value exceeds the United States price for the merchandise.

Section 736(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673e(a)(1982), provides in part:

> (a) Publication of antidumping duty order
>
> Within 7 days after being notified by the Commission of an affirmative determination under section 1673d(b) of this title, the administering authority shall publish an antidumping duty order which—
>
> (1) directs customs officers to assess an antidumping duty equal to the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise, * * *
>
> * * * * * * *
>
> (2) includes a description of the class or kind of merchandise to which it applies, in such detail as the administering authority deems necessary, and
>
> (3) requires the deposit of estimated antidumping duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise as deposited.

Plaintiff contends the subject antidumping order impermissibly excluded particular products from the class or kind of merchandise lawfully subject to antidumping duties. In view of this exclusion, plaintiff urges a writ of mandamus should issue to compel the Department of Commerce, specifically the ITA, to correct the antidumping duty order to conform to the requirements of the statute. Plaintiff does not, by this action, challenge the LTFV sales and material injury determinations made at the administrative level.

Defendants respond that, absent a casual nexus between dumped merchandise and injury to an industry, an antidumping order cannot be entered against merchandise which is not causing injury to a domestic industry. Defendants further suggest where other grounds for relief exist, a writ of mandamus, being an extraordinary remedy, should not issue.

The essence of this dispute involves the conflicting interpretations of 19 U.S.C. § 1673 advanced by the respective parties. Plaintiff proposes an extremely literal interpretation of the statute. Since the ITA found a class or kind of merchandise was being sold in the United States at less than fair value, and the ITC found material injury in two of the seven industries involved, plaintiff concludes the antidumping order should have required estimated duties to be deposited on all seven like products included in the investigation. Thus, under plaintiff's interpretation of § 1673, injury to one industry is all that is required to issue an antidumping duty order covering the entire class or kind of merchandise being sold at less than fair value.

Defendants maintain § 1673 provides for imposition of antidumping duties if the ITA finds a class or kind of merchandise is being sold at less than fair value *and* the ITC determines an industry is materially injured or threatened with such injury by reason of imports of that merchandise. In defendants' view, both affirmative LTFV sales and material injury determinations are required before the ITA is authorized to issue an antidumping duty order.

The issue presented by these conflicting interpretations, in its most narrow sense, is whether the term "such merchandise", as used in § 1673 (supra), refers to the entire class or kind of merchandise being sold at less than fair value or only that merchandise upon which both affirmative LTFV sales and material injury determinations have been made. For reasons set forth below, the Court finds the term "such merchandise" refers to that merchandise which satisfies both the LTFV sales and injury criteria.

19 U.S.C. § 1673d(c)(2) provides in part:

> Issuance of order; effect of negative determination.—If the determinations of the administering authority and the Commission under subsections (a)(1) and (b)(1) of this section are affirmative, then the administering authority shall issue an antidumping duty order under section 1673e(a) of this title. If either of such determinations is negative, the investigation shall be terminated * * *

Under this section of the statute, an antidumping order can be issued only where the ITA's and the ITC's determinations are both affirmative. If the ITC material injury determination is negative as to merchandise within the class or kind of merchandise being sold at less than fair value, the ITA has no authority to issue an antidumping order with respect to that merchandise. This is so irrespective of the ITA's own affirmative LTFV sales determination.

Section 731, as amended by the Trade Agreements Act of 1979, 19 U.S.C. § 1673, reaffirmed the basic standard for the imposition of antidumping duties enunciated in the Antidumping Act of 1921. S.Rep. No. 249, 96th Cong., 1st Sess. 61 (1979). The antidumping law is remedial, not punitive in nature. It was designed to protect domestic industry from sales of imported merchandise at less than fair value which either caused or threatened to cause injury. *City Lumber Co.* v. *United States,* 64 Cust. Ct. 826, 311 F.Supp. 340 (1970), *aff'd,* 59 CCPA 89, 457 F.2d 991 (1972). Where the domestic industry is not injured, it cannot avail itself of the relief accorded under the antidumping statute. Moreover, inclusion of the phrase "by reason of" in § 1673 is indicative of a causal nexus between the LTFV imports and the injury requirement. This conclusion is well-supported by examination of the legislative history of the antidumping provisions. See, e.g., S.Rep. No. 249 at 74, 75; H.R. Rep. No. 317 at 44.

Plaintiff characterizes the ITC finding of material injury in only two of the seven industries investigated as "re-defining" the "class of kind" of merchandise for which there was an affirmative LTFV sales determination. However, the ITC has on prior occasions found more than one industry to exist within a single class or kind of merchandise as described by the ITA in its final affirmative antidumping duty determinations. The ITA has in turn published a final order conforming to and coterminous with the ITC's industry and injury determinations. *Compare Color Television Receivers from the Republic of Korea and Taiwan,* No. 731-TA-134, USITC Pub. 1514 (April 1984) (two industries, only one of which was injured, found to exist within one class or kind of merchandise) *with* 49 Fed. Reg. 17,824 (1984) (final order coextensive with scope of ITC's injury determination); *Certain Welded Carbon Steel Pipes and Tubes from the Republic of Korea and Taiwan,* No. 731-TA-131, 132 and 138, USITC Pub. 1519 (April 1984) (two rectangular pipe and tube industries, only one of which was injured, found to exist within one class or kind of merchandise) *with* 49 Fed. Reg. 20,045 (1984) (final order coterminous with injury determination); *Certain Radio Paging and Alerting Receiving Devices from Japan,* No. 731-TA-102, USITC Pub. 1410 (Aug. 1983) (two industries, only one of which was injured, found to exist within one class or kind of merchandise) *with* 48 Fed. Reg. 37,058 (1983) (final order coterminous with injury determination).

If taken to its logical conclusion, plaintiff's interpretation of § 1673 would require an affirmative material injury determination in only one industry for the issuance of an antidumping order covering the entire class or kind of merchandise being sold at less than fair value. Such an incongruous result would violate the basic tenets of antidumping duty law.[2] Plaintiff's interpretation would render the ITC's role in an antidumping investigation meaningless, as there would be no need to determine the like product or products, industry or industries affected, and injury to the industry or industries. Section 1673 must be construed in connection with other provisions of the law in this field. The fact that § 1673 may be subject to more than one interpretation does not warrant a construction which contradicts both the vast body of antidumping duty law and the well-established administrative schema.

In *Royal Business Machines, Inc.* v. *United States,* 1 CIT 80, *aff'd,* 669 F.2d 692 (1980), the Court noted:

> It is plain that the action is directed at the basis of the final determinations and not at the final order. In view of the fact that plaintiff's actual ag[g]rievement was inclusion in the final determinations, it should have brought an action under 19 U.S.C. § 1516a(2)." *id.* at 88.

[2] As noted by intervenor at the hearing held before the Court, plaintiff's interpretation of § 1673 would, in this instance, subject 71 percent of the class or kind of merchandise to the antidumping order without the requisite ITC affirmative injury determination.

In the case at bar, plaintiff's actual aggrievement is exclusion from the final ITC determination of material injury. "The final order could not do less than effectuate the final determinations." *Royal Business Machines* (supra) at 88.

A writ of mandamus is an extraordinary remedy, available only in extraordinary circumstances and when no meaningful alternatives are available. The Court's power to issue a mandamus under the All Writs Act (28 U.S.C. § 16519(a)) is limited to situations in which such action is necessary or appropriate in aid of its jurisdiction. *Canadian Tarpoly Co.* v. *U.S. International Trade Commission,* 640 F.2d 1322 (1981).

To grant the requested writ of mandamus in this instance would further serve to grant the ultimate relief available had plaintiff chose to bring an action under § 1516a. If plaintiff's request is framed as an issue of statutory construction, as a question of law the appropriate avenue of recourse is similarly a § 1516a action. Had the ITA refused to issue the antidumping order following the affirmative determinations, a mandamus action to compel the performance of a ministerial act would have been appropriate. This is not the situation presented here, and there being no challenge to the Court's jurisdiction over this matter, relief in the nature of mandamus must be denied.

Accordingly, for the reasons set forth herein, plaintiff's application is denied, defendants' and intervenor's crossmotion is granted, and this action is hereby dismissed.

(Slip Op. 85-50)

AOC INTERNATIONAL. ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANTS

Consolidated Court No. 84-06-00739

Before WATSON, *Judge.*

MEMORANDUM OPINION AND ORDER

WATSON, *Judge:* Plaintiffs and the intervenor, Zenith Electronics Corporation have moved for access to confidential information in the administrative record of the determination of the United States Department of Commerce which is under judicial review in this action. It is not denied that they have a right to see this information.

The defendant however has opposed the motions on the mistaken notion thay they somehow place a cost of prosecuting the action on the government by allowing access to the record kept by the Department of Commerce in Washington, D.C. The government also raises the mystifying possibility that the fact that it has filed a copy of the record in Court will somehow create dual or multiple

records if parties have access to the record kept in the Washington, D.C. office of the agency.

The principle that guides the Court in this matter is that parties ought to have the most convenient possible access to the record, so that the judicial review may proceed speedily and efficiently. The government's objections to providing access in Washington, D.C. are unjustified and obstructive of this important objective.

Accordingly, the motions for access are granted, with the movants to pay no more than the normal copying charges of the agency.

It is hereby ORDERED that all documents designated "business confidential" in the "Revised Index of Administrative Record" for the administrative record in the civil action captioned above, filed with this Court on February 28, 1985, by the United States Department of Commerce ("Commerce Department"), and all further business confidential materials filed with this Court in the course of this litigation (the "Documents"), shall be disclosed to counsel for plaintiffs and Zenith Electronics Corporation under protective order.

The Documents shall be made available to attorneys for plaintiffs, Mark R. Joelson, Christopher Dunn, Marilyn Kerst, and William J. Clinton of the law firm of Wald, Harkrader & Ross; Lawrence R. Walders of the law firm of Tanaka, Walders & Ritger; Gail T. Cumins and Ned H. Marshak of the law firm of Sharretts, Paley, Carter & Blauvent, P.C.; and to attorneys for the intervenor, Zenith Electronics Corporation, Frederick L. Ikenson and J. Eric Nissley, subject to the following terms and conditions:

1. The above-named attorneys will treat the information contained in the requested documents as confidential to the extent such information is not otherwise available in the public portion of the administrative record.

2. Within ten days from the date of entry of this order, the above-named attorneys shall have access to these confidential documents at the offices of the International Trade Administration of the Department of Commerce and the office of the Clerk of this Court for examination and copying, subject to the following terms and conditions:

a. The above-named attorneys shall not disclose the information to anyone (including any officer, shareholder, director, or employee of any of the plaintiffs in this matter) other than their immediate office personnel actively assisting in this litigation or in administrative proceedings resulting from an order of this Court remanding this matter to the administrative agency.

b. The above-named attorneys shall cause all office personnel authorized to see the confidential information to sign a statement of acknowledgement that the information is confidential and that such information will not be disclosed to anyone other than other authorized personnel within their law firm.

c. Should the above-named attorneys consider the services of an expert necessary to the preparation of their case in this litigation, and the expert's services require the use of confidential information, they shall, prior to providing confidential information to an expert, notify all other counsel of their desire to retain an expert and shall provide all other counsel with: (1) the *curriculum vitae* of the proposed expert; (2) a description of the measures for safeguarding the confidential information to be made available to the proposed expert; (3) assurances that the proposed expert will provide the parties and this Court with a statement that the expert consents to be bound to the terms of this protective order; and (4) a certification that the proposed expert is independent of all parties in this case. No later than ten days from the date of the receipt of the above-described information, all other counsel shall either consent to the use of the expert or indicate their objection in writing. If the parties are unable to agree upon an expert within ten days, counsel seeking disclosure to the expert under this order may file an appropriate motion with this Court.

d. The above-named attorneys shall not make more than two (2) copies of any document that is deemed "confidential" pursuant to this order. A record shall be maintained of each copy made and, the name of the attorney for whom it is made.

e. Whenever any document subject to this order is not being used, it shall be stored in a locked vault, safe, or other suitable container, in a designated location at the office of counsel.

f. The above-named attorneys and their immediate office personnel (as described in 2(b)) shall neither disclose nor use any of the confidential information for purposes other than this litigation or in administrative proceedings resulting from an order of this Court remanding this matter to the Commerce Department.

g. Any document, including briefs and memoranda, that is filed with this Court in this civil action and that contains any of the confidential information shall be conspicuously marked as containing confidential information that is not to be disclosed to the public. Arrangements shall be made with the Clerk of this Court to retain such documents under seal, permitting access only to the Court, Court personnel authorized by this Court to have access, counsel for plaintiffs and counsel for the Government defendant. The party filing any document referred to in this paragraph shall also file at the same time another copy of such document from which all of the confidential information shall have been deleted.

h. Any briefs or memoranda containing confidential information shall be served in a wrapper conspicuously marked on the front "Confidential—to be opened only by (the names of the attorneys handling the case) and the Court," and shall be accompanied by a separate copy from which the confidential information shall have been deleted.

i. If it becomes necessary to introduce in evidence any documents containing the confidential information, counsel for the respective parties shall propose whatever means may be available and appropriate to limit publication of the documents to an extent no wider than is necessary for purposes of this litigation.

j. Upon conclusion of this litigation, the above-named attorneys shall return all documents containing confidential information and all copies made of such documents, including any documents or copies held by persons authorized under this order to have access thereto, except for copies which contain work notes of counsel or other authorized persons, which copies shall be destroyed. The above-named attorneys shall also submit to counsel for defendant a copy of the records required to be kept pursuant to paragraph 2(d), above. The return of such documents shall be accompanied by a certificate executed by a member of the firm of the attorneys in question attesting that the provisions of this paragraph have been complied with in all respects.

k. The above-named attorneys shall promptly report any breach of the provisions of this order to this Court; and it is further

ORDERED that the confidential status of all of those documents in the administrative record (which record has been filed in this civil action) that have been designated as "business confidential" be maintained.

(Slip Op. 85-51)

SILVER REED AMERICA, INC. AND SILVER SEIKO, LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, CONSUMER PRODUCTS DIVISION, SCM CORP., INTERVENOR

Court No. 80-6-00934

Before BERNARD NEWMAN, *Senior-Judge.*

OPINION AND ORDER ON DEFENDANT'S MOTION FOR VACATUR OF REMAND

Remand of this antidumping case to the Department of Commerce, International Trade Administration ("ITA"), for redetermination of foreign market value of plaintiffs' portable electric typewriters from Japan without regard to the exporter's sales price ("ESP") offset limitation (19 CFR § 353.15(c)) and for reconsideration of plaintiffs' claim for level of trade adjustment is vacated. Plaintiffs' entries (the liquidation of which was enjoined) must be liquidated in conformity with the ESP offset limitation in view of the decision of the Court of Appeals for the Federal Circuit on interlocutory appeal sustaining the validity of the limitation. Remand to ITA for reconsideration of plaintiffs' claim for a level of trade adjustment is no longer appropriate since the actual duty as-

sessment rate and estimated duty deposits are governed by the record before ITA in the administrative reviews under 19 U.S.C. §§ 1673e(c) and 1675(a) and not by the record in the final affirmative less than fair value determination challenged by plaintiffs in this case. Therefore, recalculation of dumping margins on remand would have no prospective effect regarding actual duty assessment or deposits of estimated duties.

[Defendant's motion granted.]

(Decided May 1, 1985)

Wald, Harkrader & Ross (Christopher Dunn and *William J. Clinton, Esqs.,* of counsel) for plaintiffs.

Richard K. Willard, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, *Velta A. Melnbrencis, Esq.* for defendant.

Stewart and Stewart (Eugene L. Stewart and *Terence P. Stewart, Esqs.,* Special Counsel) for intervenor.

NEWMAN, *Senior Judge:* This antidumping case, covering portable electric typewriters ("PETs") from Japan, is before the Court on remand from the Court of Appeals for the Federal Circuit for further proceedings. *Consumer Products Division, SCM Corporation (United States, Party-In-Interest)* v. *Silver Reed America, Inc. and Silver Seiko, Ltd.,* CAFC Appeal No. 84-1118 (January 28, 1985). In an interlocutory appeal, our Appellate Court sustained the validity of the exporter's sales price offset limitation prescribed by 19 CFR § 353.15(c) ("ESP offset cap"), reversing this Court's decision of February 1, 1984. 7 CIT —, Slip Op. 84-8 (1984).

Defendant has moved for vacatur of that part of Slip Op. 84-8 which remanded this case to the Department of Commerce, International Trade Administration (ITA), for redetermination of foreign market value without regard to the ESP offset cap, and for reconsideration of plaintiffs' claim for a level of trade adjustment. By order of March 9, 1984, this Court stayed the remand to ITA pending the interlocutory appeal respecting the ESP offset cap issue, which stay was extended by order dated March 15, 1985 for a period of thirty days following this Court's disposition of defendant's motion for vacatur and entry of final judgment.

Defendant's motion for vacatur is predicated upon the grounds that intervening circumstances have rendered the remand unnecessary and that unless the remand is vacated, this Court will be required to issue an advisory opinion, contrary to Article III of the Constitution.

Specifically, defendant maintains that the Appellate Court's decision in the interlocutory appeal in this case requires vacatur of this Court's remand to ITA with regard to the ESP offset cap. Plaintiffs have not opposed vacatur of this aspect of the remand. Additionally, however, defendent seeks vacatur of the remand to ITA for reconsideration of plaintiffs' claim for a level of trade adjustment.

Defendant maintains that remand to ITA for reconsideration of plantiffs' claim for a level of trade adjustment is no longer necessary because: (1) Plaintiffs' claim, even if allowed upon remand, would not eliminate the dumping margins found in the final affirmative less than fair value (LTFV) determination, and therefor such determination and antidumping order are valid; (2) a reconsideration of the claimed level of trade adjustment could, at most, lead to a finding that the dumping margins as found in the LTFV investigation were too high, but such a finding would have no practical effect since the margins found in the LTFV determination were, and will not, be used as the basis for duty assessment; and (3) neither the dumping margins as originally determined in the LTFV investigation nor those recalculated on remand in this case, can serve as the basis for cash deposits of estimated duties with regard to plantiffs' PETs because of subsequently published administrative review determinations.

In short, defendant posits that any recalculation of dumping margins determined in the final LTFV investigation would have no prospective effect with regard to either actual antidumping duty assessments for plaintiffs' PETs of the cash deposit rate for estimated duties, and therefore any decision of this Court respecting ITA's action on remand would, in effect, be merely an advisory opinion.

In opposition to vacatur respecting their claimed level of trade adjustment, plaintiffs contend that a final decision on remand in this case would indeed have prospective effect on plaintiffs' entries of PETs because of the preliminary injunction issued by this Court on June 21, 1984 (7 CIT —, Slip Op. 84-72 (1984)). There, this Court enjoined, pending final disposition of this case, liquidation of plaintiffs' entries of PETs from Japan, expressly including the entries covered by the "early determination", which was challenged in *Brother Industries, Ltd.* v. *United States,* 3 CIT 126, 540 F. Supp. 1341 (1982), *aff'd. sub nom. Smith-Corona Group* v. *United States,* 713 F. 2d 1568 (Fed. Cir. 1983), *cert. denied,* 104 S. Ct. 1274 (1984).[1]

Plaintiffs advance the argument that since this Court held in Slip Op. 84-72 the liquidation of plaintiffs' entries "should be subject to the final decision by the Court of Appeals or this Court in the present action" (Slip Op. 84-72 at 10-11), the final decision in this case is conclusive with respect to the liquidation of all plaintiffs' unliquidated entries. Specifically, plaintiffs contend that a final decision in the case after remand (1) would decide plaintiffs' liability for antidumping duties respecting the early determination entries; (2) would be binding on ITA in a remand in Consol. Court No. 83-10-01522, covering subsequent entries;[2] and (3) would

[1] The Commerce Department's early determination covers entries from January 4 to May 7, 1980. January 4, 1980 was the date on which the Treasury Department issued its tentative determination of sales at less than fair value and suspended liquidation of entries. 45 Fed. Reg. 1220. May 7, 1980 was the date of publication by the International Trade Commission of its affirmative final injury determination. 45 Fed. Reg. 30188.

[2] The level of trade issue has been raised by plaintiffs in this action challenging an administrative review of the antidumping order.

govern estimated duty deposits on future entries of plaintiffs' PETs.

The Court concludes that notwithstanding plaintiffs' seemingly logical contention, defendant's position is correct, and consequently the remand to ITA must be vacated.

At this juncture, it is important to note that in this action plaintiffs have challenged the LTFV determination, but that determination did not constitute the basis for actual duty assessment, either with respect to past entries (the liquidation of which was suspended after publication of ITA's preliminary affirmative LTFV determination) or subsequent entries. Following an antidumping order, actual duty assessment is based upon an administrative review, either an "early determination" under 19 U.S.C. 1673e(c) or periodic review determination pursuant to 19 U.S.C. § 1675(a). The results of such administrative reviews serve as the basis for actual duty assessment with regard to the entries covered by the particular determination and as the basis for cash deposits of estimated duties for future entries. ITA's administrative review determinations are subject to judicial review. 19 U.S.C. § 1516a(a)(2). Unless liquidation is enjoined by the Court, entries covered by ITA's determination are to be liquidated in accordance with the determination if they are entered, or withdrawn from warehouse, for consumption on or before the publication date of a notice of a decision of this Court or of the Court of Appeals for the Federal Circuit, not in harmony with that determination. 19 U.S.C. § 1516a(c). If the Court enjoins the liquidation of entries covered by a determination, then the entries, the liquidation of which was enjoined, are to be liquidated in accordance with the final Court decision in the action. 19 U.S.C. § 1516a(e). However, the fact that liquidation of entries is enjoined by the Court in an action challenging an affirmative LTFV determination, as in the present case, does not mean that the administrative record in the LTFV investigation is the basis for determining the actual amounts of antidumping duties due upon entries covered by subsequent administrative review determinations.

The foregoing conclusion is compelled by an analysis of the entire statutory scheme for administrative and judicial review, including the provisions contained in 19 U.S.C. §§ 1673e(c), 1675(a) and 1516a(a)(2) (A) and (B). As recently observed by our Court of Appeals in *Freeport Minerals Company* v. *United States*, CAFC Appeal No. 84-1086 (April 3, 1985):

> * * * Certainly neither ITA nor the courts are free to abandon the statutory framework when a case is remanded. Congress has granted the lower court broad powers of relief, including authority to issue "orders of remand," [footnote omitted] but nowhere has it granted that court authority to assume control of an agency case, once that case has come to it for judicial review, and retain control over it regardless of the statutes which the agency must follow. [Footnote omitted.]

Hence, under the statutory framework applicable here, judicial review must be based upon the administrative record of the particular proceeding resulting in the challenged determination.

It must be stressed, however, that the Court's rulings on questions of law in the review of a final determination have precedential effect in subsequent cases involving an issue previously decided. In Slip Op. 84-8 this Court held that ITA erred in denying plaintiffs' claim for an adjustment to foreign market value for differences in circumstances of sale predicated upon the difference in the levels of trade to which Silver sold PETs in the home market and in the United States market. It appears that ITA found plaintiffs' claimed level of trade adjustment unwarranted on the basis that in both the home and United States markets sales were made to "large wholesale quantity customers" (45 Fed. Reg. 18418); and that ITA disregarded plaintiffs' evidence respecting the extra expenses involved in home market sales to retailers as opposed to United States sales to wholesalers. Plainly, in responding to plaintiffs' claimed level of trade adjustment, ITA misconstrued the antidumping law in that the agency ignored the distinction between an adjustment related to differences in quantities sold and an adjustment predicated upon "other differences in circumstances of sale", *viz.*, level of trade. After this Court held that the quantities sold in the two markets compared were not dispositive of whether or not a level of trade adjustment should have been granted, the action was remanded to ITA (1) to determine whether the expense data submitted by Silver satisfactorily supports a finding that the different levels of trade in the home market and in the United States affected price comparability; and (2) to determine whether Silver adequately quantified its claimed adjustment predicated upon its proof of higher expenses in selling to retailers in the home market rather than to wholesalers. From the foregoing directives it is evident that the remand contemplated specific factual findings by ITA that would justify either the allowance or disallowance of the claimed adjustment following the proper legal criterion. However, such factual findings on remand and recalculation of dumping margins, relating to the time period and entries embraced by the final LTFV determination, would have no prospectively binding effect in subsequent administrative reviews involving the level of trade issue.

Plaintiffs' argument that because liquidation of its entries was enjoined, it follows that ITA's action on remand (and this Court's review thereof) would have a prospective effect on the actual duty assessment rates and estimated duty deposit rates established in the "early determination" (and subsequent administrative reviews) envisions a broader scope of the present action and the preliminary injunction than is contemplated by law or by this Court's decision in Slip Op. 84-72. As previously noted, any factual findings in the present case on remand to ITA regarding the level of trade issue,

and the Court's review thereof, could not have prospective application because that issue must be resolved on the basis of the record before ITA in the particular review proceeding. To reiterate, with respect to matters of law, the Court's decision in Slip Op. 84-8 has precedential effect in cases involving the level of trade issue in subsequent administrative reviews. However, the amount of the actual antidumping duties to be assessed and cash deposits for estimated duties to be collected upon specific entries must be based upon the facts adduced in the administrative review covering those particular entries.

Finally, the Court agrees with defendant's assertion that in enjoining liquidation of plaintiffs' entires in Slip Op. 84-72 this Court did not hold that it would thereby review plaintiffs' level of trade claim in the present case with respect to the early determination entries or with respect to the entries covered by Consol. Court No. 83-10-01522. The preliminary injunction expressly sought to preserve the effect of the final decision in this case respecting the ESP offset cap, which this Court held invalid. As this Court commented, "[i]f this Court's decision invalidating the ESP offset cap is upheld on appeal, *there may be no margins of dumping respecting any of Silver's entries*"; and "to bar the equitable relief sought by plaintiffs respecting the early determination entries, as urged by defendant, would permit the Customs Service to liquidate such entries in utter disregard of the final decision in the present case, resulting in the assessment of antidumping duties, *whether or not there were any margins of dumping in connection with these entries" (Slip Op. 84-72 at 11 and 13)* (emphasis added). Plaintiffs do not dispute defendant's contention that even if ITA allowed plaintiffs' claimed level of trade adjustment in full, significant margins of dumping would still exist and the LTFV determination and antidumping order would remain valid.

In light of the foregoing, it is hereby ORDERED:

(1) defendant's motion for vacatur of that part of this Court's decision on February 1, 1984 in Slip Op. 84-8 which remands this case to ITA and for entry of final judgment is granted:

(2) the final affirmative LTFV determination respecting PETs from Japan manufactured by Silver Seiko, Ltd. is valid.

Judgment will be entered accordingly.

ABSTRACTED PI

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESS
				Item No. ar
P85/84	Rao, J. April 24, 1985	J.C. Penney Purchasing Corp.	82-5-00667	Item 737.95 17.5% or
P85/85	Rao, J. April 24, 1985	S.T.C. Telecorp Inc.	84-1-00142, etc.	Item 685.24 8.2%
P85/86	Rao, J. April 24, 1985	Susan Gail Handbags, Inc.	84-8-01123	Item 656.25 25%, 23.1 21.3%, 19 17.5%
P85/87	DiCarlo, J. April 25, 1985	North American Foreign Trading Corp.	79-11-01755	Item 68.40 5.5%
P85/88	Re, C.J. April 29, 1985	Polly Gaz International Corp.	78-8-01467, etc.	Item 774.60 8.5%

ED PROTEST DECISIONS

ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
n No. and Rate	Item No. and Rate		
737.95 .5% or 16.2%	Item A737.15 Free of duty for vehicle Item A685.60 Free of duty for transmitter	Agreed statement of facts	Savanannah and San Francisco Radio remote control vehicles
685.24 2%	Item 911.95 Free of duty	Agreed statement of facts	New York Radio portion of Model No. 7560 clock radio telephones
656.25 %, 23.1%, .3%, 19.4%, .5%	Item 745.68 8.5%m 8.1%, 7.7%, 7.3%, 6.9%	Agreed statement of facts	New York Clasps or parts thereof
68.40 5%	Item A688.40 Free of duty	Agreed statement of facts	New York D-2 and D-3 calculator black-jack
774.60 5%	Item 772.15 Free of duty pursuant to GSP	Agreed statement of facts	Los Angeles Plastic "noddable" flowers and vase

ABSTRACTED REAP

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS O VALUATI
R85/177	Re, C.J. April 23, 1985	Chori America, Inc.	75-4-00831	Export value
R85/178	Watson, J. April 23, 1985	Durlacher & Co.	243335A, etc.	Export value
R85/179	Watson, J. April 23, 1985	Durlacher & Co.	298891A, etc.	Export value
R85/180	Watson, J. April 23, 1985	Linmark International Corp.	R61/20495	Export value
R85/181	Watson, J. April 23, 1985	Michelin Tire Corp.	79-5-00871	Countervailing duties

REAPPRAISEMENT DECISIONS

ASIS OF LUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S., C.D. 4739	New York Los Angeles Miscellaneous articles
value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Silk scarves
value	Appraised values less 7.5% thereof	Agreed statement of facts	New York Silk scarves, etc.
value	Appraised unit values less 7.5% thereof net packed	Agreed statement of facts	Chicago Transistor radios together with their accessories and parts; an entirety
rvailing s	3.25, 2.513, 1.93	Agreed statement of facts	Baltimore, Los Angeles, Detroit, New York Michelin x-radial steel belted tires

ABSTRACTED REAPPRAISEMEN

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
R85/182	Watson, J. April 23, 1985	Michelin Tire Corp.	80-6-00909	Countervailing duties	1
R85/183	Watson, J. April 23, 1985	Paula Fashions Inc.	238660A, etc.	Export value	F
R85/184	Watson, J. April 23, 1985	Texas Instruments Inc.	82-5-00699	Constructed value	2
R85/185	Watson, J. April 23, 1985	Trans Ocean Import Co.	278544A, etc.	Export value	A
R85/186	Watson, J. April 23, 1985	W.J. Byrnes & Co.	265161A, etc.	Export value	F
R85/187	Watson, J. April 23, 1985	W.R. Filbin & Co.	75-10-02527	Countervailing duties	5

EMENT DECISIONS—Continued

N	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
	1.93, 1.26, 1.284	Agreed statement of facts	Baltimore, Buffalo, New York, Champlain, Detroit, Jacksonville, Port Huron Michelin x-radial steel belted tires
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	New York Silk scarves, etc.
e	24.91% of entered value	Agreed statement of facts	Dallas Semiconductor devices
	Appraised values less 7.5% thereof	Agreed statement of facts	Baltimore Rugs, etc.
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Los Angeles Silk piece goods
	5.37	Agreed statement of facts	Port Huron Michelin x-radial steel belted tires

R85/188	Watson, J. April 24, 1985	Michelin Tire Corp.	79-12-01805	Countervailing duties
R85/189	Watson, J. April 25, 1985	D.N.E. Walter Co.	R58/330, etc.	Export value
R85/190	Watson, J. April 25, 1985	Shriro Trading Corp.	R62/1213	Export value
R85/191	Rao, J. April 26, 1985	Komatsu America Corp.	77-9-03598	Export value

ng	1.93, 1.26, 1.284	Agreed statement of facts	Atlanta, Baltimore, Buffalo/Niagara Falls, Detroit, New York, Norfolk, Port Huron, Portland, Oreg. Michelin x-radial steel belted tires.
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values, net packed	Agreed statement of facts	San Francisco Rugs, etc.
	Appraised unit values less 7.5% thereof	Agreed statement of facts	New York Garden tools
e	Represented by C and I invoice unit values, plus 11%	Agreed statement of facts	Portland, Oreg. Bulldozers, etc.

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON, D.C. 20229

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE, $300

U.S. MAIL

POSTAGE AND FEES PAID
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